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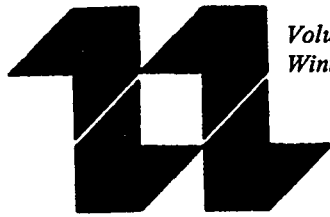
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by Ronald Benton Brown



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Florida's New "Drunk Driving" Laws: An Overview of Constitutional and Statutory Problems

by Mark Dobson*

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* A.B., Georgetown University, 1970; J.D. Catholic University, 1973; LL.M., Temple University, 1977; Assistant Professor of Law, University of North Dakota Law School, 1977-80; Associate Professor of Law, Nova University Center for the Study of Law, 1980-83. The author gratefully acknowledges the assistance of Mr. Ira Schacter, second year law student at Nova University Center for the Study of Law, in the preparation of this article.

I. Introduction

As death and injury tolls increase, concern over "drunk driving"¹ has become nationwide. Citizen groups have been formed,² federal legislation passed,³ a presidential commission appointed,⁴ and new law enforcement techniques implemented to reduce the number of drunk drivers.⁵ Florida's situation reflects the national picture. During 1980,

1. As used herein "drunk driving" includes driving under the influence, driving with unlawful blood alcohol level and driving while intoxicated. The National Highway Traffic Safety Administration claims drinking occurs in at least 40-55% of all fatal car accidents. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 52 (1981).

2. The largest national organization is MADD (Mothers Against Drunk Driving), with eighty-three chapters in twenty-nine states. *See* Starr, *The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 34.

3. *See* Alcohol Traffic Safety - National Driver Register Act of 1982, Pub. L. No. 97-364, 96 Stat. 1738 (1982) which provides incentive grants to those states adopting specified sanctions for drunk driving offenses and establishes a National Driver Register to help states exchange information about individual driving records. *See* S. REP. NO. 360, 97th Cong., 2d Sess. (1982); H. REP. NO. 867, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3367-76.

4. On June 4, 1982 a thirty member commission, headed by former Secretary of Transportation John Volpe, was formally sworn in and directed to provide national focus on drunk driving. *See Drunken driving panel ready to go to work*, Fort Lauderdale News and Sun-Sentinel, June 5, 1982, at 7A, col. 1.

5. In Montgomery County, Maryland; police use a "Sobriety Checkpoint" procedure to detect impaired drivers. All drivers are stopped for inspection but only those smelling of alcohol must perform a "sobriety test" consisting of walking a straight line, standing on one leg and reciting the alphabet. Between November 1981 and March 1982, this procedure detected over one hundred impaired drivers. *The Drunk Blitz*, The Nat'l L.J., March 22, 1982, at 1, col. 2. *See also Death on the Road*, Wall St. J., Apr. 20, 1982, at 1, col. 4.

The American Civil Liberties Union has questioned the checkpoint's constitutionality. However, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), approved routine Border Patrol stops at permanent checkpoints to search for illegal aliens. The Court rejected arguments that reasonable suspicion was required, since traffic flow past the checkpoint would not allow "the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." *Id.* at 557. Since the checkpoints were publicly known and administrative officials fixed the location, the intrusion differed from random highway stops based on a particular officer's whim. Referral to a second inspection place based on Mexican ancestry alone was considered reasonable. The parallel to sobriety checkpoints is obvious. Traffic past the checkpoint does not allow time to study all drivers. Likewise, an objective fact, breath smell, determines who is questioned further.

drinking was the third highest factor in accidents statewide.⁶ In 1981 there were 48,084 arrests for driving under the influence of either liquor or drugs.⁷ While nationwide traffic fatalities declined in 1981, Florida's increased.⁸

Given this situation, the 1982 Florida legislature passed one of the nation's toughest "drunk driving" laws.⁹ Effective July 1, 1982, it aims at deterring drunk driving by three methods: (1) increasing penalties, (2) making evidence gathering easier, and (3) making exclusion of evidence harder. While praiseworthy in its goals, the law contains several provisions of dubious constitutionality and others which create

Officials supporting "sobriety checkpoints" may also rely on *Delaware v. Prouse*, 440 U.S. 648 (1979), which found stopping automobiles to check for driver licenses and registrations without probable cause or reasonable suspicion violated the fourth amendment when individual officers arbitrarily chose the cars. The Court indicated other methods could satisfy fourth amendment reasonableness standards: "This holding does not preclude . . . developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. *Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.*" *Id.* at 663 (emphasis added). As Maryland procedure requires *all* drivers to stop, its constitutionality should be upheld. *See United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981) (Roadblock stopping all west-bound vehicles, except semi-trucks to check licenses and registrations constitutional; *Delaware v. Prouse* distinguished.) *cert. denied*, 454 U.S. 832 (1981), *reh'g denied*, 454 U.S. 1069 (1981).

6. Drinking existed in 36,986 accidents, nine percent of the statewide total. Sixteen percent of drivers and/or pedestrians in fatal accidents had been drinking. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, TRAFFIC ACCIDENT FACTS 6, 15 (1980).

7. This was 10.4 percent of the total statewide arrests, second only to larceny at 14.6 percent. FLA. L. ENFORCEMENT ANN. REP. 109 (1981).

8. During 1981 motor vehicle deaths declined four percent nationwide but, in Florida, they increased eight percent. *See NATIONAL SAFETY COUNCIL, TRAFFIC SAFETY MAGAZINE*, May-June 1982, at 26.

9. The 1982 legislature actually amended the drunk driving laws twice. *See* 1982 Fla. Sess. Law. Serv. 155, 403 (West). At least five other states recently changed their laws to provide for harsher penalties and/or stricter enforcement. *See* CAL. VEH. CODE §§ 23151-23229 (Deering Supp. 1982); ILL. REV. STAT. ch. 95 ½, §§ 11.501-11.501.2 (Supp. 1981); 1982 Kan. Sess. Laws. ch. 144, 619; ME. REV. STAT. ANN. tit. 29, §§ 1312-1314 (Supp. 1981); MD. ANN. CODE art. 16, §§ 205-205.2 (Supp. 1981). For discussions of Illinois's and California's new laws see Comment, *Drunk Drivers versus Implied Consent: A Sobering New Illinois Statute*, 15 J. MAR. L. REV. 479 (1982); Comment, *Driving with 0.10% Blood Alcohol: Can The State Prove It?*, 16 U.S.F.L. REV. 817 (1982).

problems of statutory interpretation. This article's purpose is to review the new law's changes in light of the constitutional and statutory interpretation problems it contains. Since some issues are new in Florida, reference is made to the case law of other jurisdictions, as well as previous Florida cases.

II. Statutory Offense Provision and Penalty Changes

A. Statutory Offenses

Former Florida law considered "drunk driving" so serious that three different criminal violations could occur: (1) driving under the influence; (2) driving while intoxicated; or (3) driving with unlawful blood alcohol¹⁰ The new law retains these offenses, merely rearranging and consolidating their statutory placement. Driving under the influence violates either of two statutory provisions. Florida Statutes section 316.193(1)¹¹ makes it unlawful: "under the influence of alcoholic beverages, model glue, or any substance controlled . . . , to the extent . . . normal faculties are impaired, . . . to drive or be in the actual physical control of any vehicle within this state."¹² Florida Statutes section 316.1934(1)¹³ substantially duplicates this provision, replacing former Florida Statutes Section 322.262(1).¹⁴ However, under section 316.1934(1) controlled substances are also included, while model glue

10. See *infra* text accompanying notes 12-22.

11. FLA. STAT. § 316.193(1) (Supp. 1982).

12. *Id.* Driving under the influence can be shown several ways. If blood alcohol content level registers 0.10 percent or more, under Florida Statutes section 316.1934(2)(c) (Supp. 1982) this is *prima facie* evidence of being under the influence. *State v. Bender*, 382 So. 2d 697, 699 (Fla. 1980) declared this a rebuttable, rather than conclusive, presumption. Field sobriety tests are often used to bolster the state's claim. These may be administered without consent, if there is "sufficient cause to believe" the driver has violated the law. *State v. Liefert*, 247 So. 2d 18, 19 (Fla. 2d Dist. Ct. App. 1971). Such tests may be protected by the Florida Accident Report Privilege. *DuVal Motor Co. v. Woodward*, 419 So. 2d 303 (Fla. 1982).

13. Florida Statutes section 316.1934(1) (Supp. 1982) makes it unlawful "for any person who is under the influence of alcoholic beverages or controlled substances when affected to the extent that his normal faculties are impaired, to drive or be in the actual physical control of any motor vehicle within this state." Controlled substances are enumerated in Florida Statutes section 893.03, schedules I through V.

14. FLA. STAT. § 322.262(1) (1981).

is omitted.

Previous Florida law made driving with blood alcohol content 0.10 or more, illegal under two provisions. The new law retains this dual prohibition. Former Florida Statutes section 316.193(3)¹⁵ has been replaced and its prohibition combined with driving under the influence in present section 316.193(1). Former Florida Statutes section 322.262(2)(c),¹⁶ has been renumbered as section 316.1934(2)(c).¹⁷

Under former Florida Statutes section 860.01(1), a person committed a separate offense when driving "intoxicated or under the influence" and deprived "of full possession of his normal faculties. . . ."¹⁸ Florida Statutes section 316.1931(1)¹⁹ replaces section 860.01(1) and also prohibits being "in actual physical control of"²⁰ a motor vehicle in this condition. When property damage or personal injury results from such condition, the offense is a first degree misdemeanor under both past and present law.²¹ If another's death results, the crime becomes D.W.I. manslaughter under both past and present law. However, former section 860.01(2) only applied to intoxication²² from alcohol. Thus

15. FLA. STAT. § 316.193(3) (1981).

16. FLA. STAT. § 322.262(2)(c) (1981).

17. FLA. STAT. § 316.1934(2)(c) (Supp. 1982).

18. FLA. STAT. § 860.01(1) (1981).

19. FLA. STAT. § 316.1931(1) (Supp. 1982).

20. "In actual physical control" exists whenever a vehicle can be operated and a driver is not too intoxicated to do so. *See* vol. — Op. Att'y Gen. 066-69 (1966).

21. *See* FLA. STAT. § 316.1931(2) (Supp. 1982) and former FLA. STAT. § 860.01(2) (1981).

22. Proof of intoxication requires more than just driving under the influence. "[T]he term, 'intoxicated', is stronger than and includes the terms 'under the influence' of intoxicating liquor." *Taylor v. State*, 46 So. 2d 725, 726 (Fla. 1950) (citing *Cannon v. State*, 91 Fla. 214, 107 So. 360, 362 (1925)).

Baker v. State, 377 So. 2d 17 (Fla. 1979), rejected the claim that former § 860.01(2), now § 316.1931(2), violated due process, because it did not require causal connection between intoxication and the resulting death, thus allowing a non-negligent driver to be found guilty of D.W.I. manslaughter. The court declared only three elements are needed to show D.W.I. manslaughter, that: "(1) a death occurred; (2) the death resulted from the operation of a vehicle by the defendant, and (3) the defendant was intoxicated at the time he operated the vehicle." *Baker*, 377 So. 2d at 18. The negligence occurred when the driver began driving while intoxicated and continued until the accident happened. Since driving while intoxicated is *per se* reckless, the legislature could rationally conclude imposing criminal sanctions without a showing of causa-

if the intoxication was from glue or controlled substances, D.W.I. manslaughter charges were not possible.²³ Present section 316.1931(2) provides that D.W.I manslaughter charges may be brought even if the intoxication occurs from these substances.

B. Penalties

One of the new law's major changes was to increase penalties for conviction. Former Florida law imposed different penalties for first offenses of driving under the influence and driving with unlawful blood alcohol.²⁴ No reason for such disparate treatment appeared in the previous statutory scheme. Under the new law, both violations are equally punishable.²⁵ The new penalty provisions raise the minimum fine for driving under the influence to two hundred fifty dollars. For a second conviction there is a minimum fine of five hundred dollars, the previous maximum for either second offense,²⁶ and a maximum of one thousand dollars. For a third or subsequent offense a minimum of a one thousand dollar and a maximum of a two thousand five hundred dollar fine is set, compared to a previous maximum of one thousand dollars for driving under the influence and five hundred dollars for driving with unlawful blood alcohol.²⁷

Like previous law, driving while intoxicated carries the same punishment as driving under the influence.²⁸ When this is a first-degree

tion between driving in such a condition and any death would act as a deterrent.

23. *But see* State v. Rafferty, 405 So. 2d 1004 (Fla. 4th Dist. Ct. App. 1981) where manslaughter charges were brought due to intoxication from a controlled substance.

24. Under former Florida Statutes section 316.193(2)(a) (1981) first offenders convicted of driving under the influence faced a fine between twenty-five dollars and five hundred dollars plus possible imprisonment up to six months. Under former Florida Statutes section 316.193(4)(a) (1981) first offenders for driving with unlawful blood alcohol faced no minimum and a maximum two hundred-fifty dollar fine, one-half the possible maximum for driving while impaired. Likewise first offenders with unlawful blood alcohol could be sentenced to only a maximum ninety days, one-half the possible maximum for driving while impaired.

25. *See* FLA. STAT. § 316.193(2)(a), (b) (Supp. 1982).

26. *See* former FLA. STAT. § 316.193(2)(b), 4(c) (1981).

27. *See* former FLA. STAT. § 316.193(2)(c), 4(c) (1981).

28. *See* FLA. STAT. § 316.1931(1) (Supp. 1982).

misdemeanor, because of personal injury or property damage, Florida Statutes section 316.193(2) continues to impose punishment under the general penalty provisions of sections 775.082 and 775.083.²⁹ However no penalty can be less than that imposable under section 316.193.³⁰ This ensures the mandatory penalty provisions for repeat offenses apply when a lesser penalty might otherwise be given.

Contrary to popular belief the new "drunk driving" law does not substantially change imprisonment penalties. First offenses may still carry no mandatory jail terms.³¹ Second and third offenses within three and five years, respectively, are punishable by minimum mandatory sentences of ten and thirty days respectively.³² However, if a driver is

29. Under FLA. STAT. § 775.082(4)(a) (1981), a first degree misdemeanor may receive up to one year imprisonment, plus a one thousand dollar (\$1,000.00) fine under FLA. STAT. § 775.083(1)(d) (1981).

30. FLA. STAT. § 316.193 (Supp. 1982).

31. According to public opinion, there is no mandatory imprisonment sentence for a first offender for any of the three offenses. *See* Fort Lauderdale News and Sun-Sentinel; Apr. 25, 1982, at 15A, col. 1. However a strict reading of FLA. STAT. § 316.193 does not support this. Section 316.193 states in part:

(2) Any person who is convicted of a violation . . . shall be punished.

(a) By a fine of:

[the various fines for first, second and third offenses are listed.]

and

(b) By imprisonment for:

1. Not more than 6 months for a first conviction.

(emphasis added).

If the legislature wished to use imprisonment to supplement fines for first offenders, the words "and/or" should have been used. Former section 316.193(2)(a) (1981) clearly indicated imprisonment for first offenders was not mandatory:

Any person who is convicted of a violation . . . shall be punished.

(a) For first conviction thereof, by imprisonment . . . *or* by fine . . . *or* by both such fine and imprisonment.

(emphasis added.)

If the legislature did not intend mandatory incarceration for first offenders, it should amend section 316.193(2) next session to clarify this.

32. FLA. STAT. § 316.193(4)(b), (c) (Supp. 1982). This also applies to repeat first degree misdemeanants under § 316.193(1) (Supp. 1982). *See supra* text accompanying notes 29-31. Under the new law's enhanced sentencing provisions, prior convictions for driving under the influence, driving while intoxicated, and/or driving with unlawful blood alcohol are considered the same offenses. *See* FLA. STAT. § 316.193(4)(c) (Supp. 1982).

convicted of a second offense more than three years after a first conviction or a third offense more than five years after a first conviction, imprisonment is governed by the first offender provisions.

Besides a fine or possible jail term, prior offenders could be required to attend alcohol education programs and undergo evaluation and treatment.³³ This is now mandatory for all first-time offenders and encompasses chemicals other than alcohol.³⁴ Considering the legislature's recognition that chemicals besides alcohol impair driving, this change is wise.³⁵

First offenders must also do fifty hours of "public service" or "community work project."³⁶ As there is no definition of "public service" or "community work project", each county can fashion its own requirements³⁷ in keeping with the differing community needs of Florida's counties. No public service is required of repeat offenders within three and five year periods. Evidently the legislature envisioned a sentencing scheme where most first offenders receive the minimum fine, required education and/or evaluation, and no incarceration unless unusual circumstances exist. The community service requirement should usually be an alternative, and not a supplement, to incarceration for

33. Former Florida Statutes section 316.193(5) (1981) stated in part: "At the discretion of the court, any person convicted . . . may be required to attend an alcohol education course specified by the court and may be referred to an authorized agency for alcoholism evaluation and treatment. . . ."

34. See FLA. STAT. § 316.193(3) (Supp. 1982).

35. A Minnesota Department of Public Safety study reports assessment and rehabilitation may be more effective than increased fines and incarceration. According to the study, "Convicted drunk drivers who went through an assessment and rehabilitation were only half as likely to be re-arrested for drunk driving as those who had no assessment and received the conventional penalties of a fine and/or jail sentence." NATIONAL SAFETY COUNCIL, TRAFFIC SAFETY MAGAZINE, Aug. 1979, at 19.

36. See FLA. STAT. § 316.193(4)(a) (Supp. 1982).

37. How widely counties may define this is shown in recent newspaper articles. In Palm Beach County, offenders donating one pint of blood receive credit for eight hours of work. See *Patrol Targets Drunk Drivers*, Miami Herald, June 13, 1982, at 6B, col. 1. Broward County created a Community Service Program to oversee the requirement. Counselors examine an offender's background and work schedules before making a public service assignment. Assignments cover a broad range of menial activities. The new Program monitors an offender's hours to make sure the full requirement is met. See *Civic Jobs Lined Up for Drunk Motorists*, Fort Lauderdale News and Sun-Sentinel, Aug. 8, 1982, at 11B, col. 1.

first offenders.³⁸ Since second and third offenders receive mandatory jail terms, the legislature apparently felt an added community service requirement would have no appreciable effect.

Statutory provisions requiring suspension or revocation of a driver's license for any "drunk driving" offense remain basically unchanged.³⁹ Like the penalty provisions, the suspension term has been lengthened and standardized.⁴⁰ Limited privileges for necessary business uses can be obtained if a convicted driver successfully completes the required substance abuse education.⁴¹ Since the course's aim is to rehabilitate and educate problem drivers, this provision will provide incentive to complete such training promptly. However, any driver twice convicted of a "drunk driving" offense or whose license has been twice suspended for refusal to comply with the implied consent law's testing provisions⁴² is ineligible for limited driving privileges.

38. State legislators commenting on the new law called this a compromise between mandatory sentencing for first offenders and previous sentencing provisions. Fear a mandatory first time sentence would further strain Florida's overcrowded jails led to the compromise. *See Drunk Driving Law May Stagger*, Fort Lauderdale News, Apr. 21, 1982, at 1B, col. 2. Even without mandatory sentencing for first time offenders, the new law has strained Florida's court system. After six months experience, jury trials in drunk driving cases have increased by 25% and guilty pleas have dropped by 12%. *See Courts feel impact of new drunk driving law*, Fort Lauderdale News and Sun-Sentinel, Jan. 23, 1983, at 1B, col. 5.

Florida is not alone in requiring community service. The new Kansas law requires either a minimum forty-eight hours incarceration or 100 hours public service. 1982 Kan. Sess. Laws. ch. 144, § 5, 624.

39. Florida Statutes section 322.28(2) (Supp. 1982) requires suspension or revocation for any of the three offenses. Former Section 322.28(2) (1981) applied only to driving under the influence of alcohol. Present Florida Statutes section 322.28(2) applies to driving under the influence of alcohol or controlled substances.

40. Florida Statutes section 322.28(2)(a) (Supp. 1982) provides a minimum suspension period of 180 days to one year for first conviction of driving with unlawful blood alcohol or driving under the influence. Former section 322.28(2)(a) (1981) provided different suspension periods for these two offenses: 30 to 90 days for unlawful blood alcohol and 90 days to one year for being under the influence. Thus the new bill again expresses the legislature's intent to treat these two offenses similarly.

Revocation periods for second and third convictions within five and ten years of a prior conviction have been substantially increased from six months to five years for second offenses, and from five years to ten years for third offenses.

41. *See* FLA. STAT. § 322.271(2) (Supp. 1982).

42. For discussion of the Implied Consent Law's required test submission pro-

The new law makes it harder for drivers whose licenses have been suspended or revoked to regain their driving privileges and impossible to do so after a certain point. When privileges are revoked, a driver must retake the examination after revocation expires.⁴³ Before re-testing, the driver must prove he has completed any required driver training or substance abuse courses.⁴⁴ However no driver's license can be re-issued to anyone convicted of four "drunk driving" offenses.⁴⁵ This provision is appropriate since after three unsuccessful attempts to rehabilitate a driver through a combination of education, fines and imprisonment, any further attempts will most likely be futile. Unlike provisions relating to fines and penalties,⁴⁶ this prohibition has no applicable time period. Thus four offenses alone, no matter how far apart, will cause permanent loss of license.

III. Miscellaneous Statutory Changes

The new law initially made six other major changes: (1) provisions for urinalysis, (2) provisions for non-forcible blood testing, (3) provisions to increase the admissibility of chemical intoxication test results, (4) provisions modifying the Accident Report Privilege, (5) provisions admitting refusals of mandatory testing, and (6) provisions for limited forcible blood testing. With the exception of the provisions modifying the Accident Report Privilege, all represent changes in the Florida Implied Consent Law which requires drivers to agree to chemical testing in return for driving privileges. However, as described below, the changes in provisions for non-forcible blood testing were subsequently amended to conform to prior law. Since the last change raises constitutional questions, it is discussed in the next section. The others are examined below.

grams *see infra* text accompanying notes 109-110.

43. *See* FLA. STAT. § 322.28(2)(d) (Supp. 1982).

44. *Id.* Like the new requirements for limited driving privileges, this should encourage convicted drivers to complete these quickly.

45. FLA. STAT. § 322.28(2)(f) (Supp. 1982). This prohibition also applies to any driver convicted of vehicular manslaughter and one other "drunk driving" offense. However at least one of the four convictions must have occurred after July 1, 1982.

46. *See supra* text accompanying notes 24-32.

A. Urinalysis Provisions

Under the former Implied Consent Law⁴⁷ drivers only consented to blood alcohol content tests. When tests were used to determine the presence of controlled substances, courts split on the admissibility of the results. In *State v. DeMoya*,⁴⁸ the driver took a requested blood test, but objected when results were used to show methaqualone. The Third District Court of Appeal suppressed the results, strictly construing the Implied Consent Law as limited to tests for alcohol. However in *State v. Rafferty*,⁴⁹ after breath tests showed no alcohol, a driver initially consented to both blood and urine testing showing methaqualone but later claimed his consent was invalid as he was not in full control of his faculties. Disregarding this argument, the Fourth District Court of Appeal decided only probable cause was needed citing *Schmerber v. California*.⁵⁰ Since the Implied Consent law only forbade non-consensual blood testing for alcohol, urine testing for controlled substances was governed by pre-law standards.⁵¹

The new law eliminates this conflict. Florida Statutes section 316.1932(1)(a)⁵² extends the implied consent provisions to both breath testing for alcohol and urine testing for controlled substances. Testing is permissible at any "detention facility or any other facility mobile or otherwise . . . equipped to administer such tests in a reasonable manner. . . ."⁵³ Breath and/or urine testing can be done if "reasonable

47. Formerly FLA. STAT. §§ 322.261-322.262 (1981), now §§ 316.1932-316.1934 (Supp. 1982).

48. 380 So. 2d 505 (Fla. 3d Dist. Ct. App. 1980).

49. 405 So. 2d 1004 (Fla. 4th. Dist. Ct. App. 1981).

50. 384 U.S. 757 (1966).

51. The result might have been different if only blood sampling for controlled substances had been done. The former Implied Consent Law could have intended to limit blood sampling to alcohol detection alone. Since urinalysis was also done, it was not necessary for the Fourth District Court of Appeal to reach this issue.

DeMoya's result might have been different had the state relied on *Schmerber*. Since this was not done, the Third District Court of Appeal found it unnecessary to confront such an issue. *DeMoya*, 380 So. 2d at 506.

52. FLA. STAT. § 316.1932(1)(a) (Supp. 1982).

53. *Id.* This contemplates use of "BAT" Mobiles, previously used by several counties for urinalysis and breath testing. See S. Gordon, "BATMOBILE": An Experience Paper Based on 100-hour Internship (1980) (unpublished M.S. Criminal Justice thesis) (Available in Nova University Library), reporting that in January, 1980, seven

cause" exists that a driver is under the influence. One type of testing does not preclude the other, but the question arises whether the same facts can supply "reasonable cause" for both tests. If so, police will routinely administer both once a driver is lawfully arrested. One source reports urinalysis is often done after breath tests fail to show blood alcohol content above the statutorily presumed level of "under the influence."⁵⁴ Indeed *Rafferty* noted "the zero readings yielded by the breathalyzer tests"⁵⁵ as one factor police could use to conclude the driver was probably under the influence of drugs.

Another question is the proper testing methods for urinalysis. Unlike breath and blood testing, the Department of Health and Rehabilitative Services has not been given responsibility to establish urine testing procedures.⁵⁶ Arguably, each county could establish separate procedures as long as the courts consider them accurate. Prior Florida case law on scientific testing is among the most liberal in the United States. Many states allow testimony concerning a scientific process only if it has "such standing and scientific recognition among . . . authorities as would justify the courts in admitting the expert testimony declared from the discovery, development, and experiments thus far made."⁵⁷ However, in *Coppolino v. State*,⁵⁸ Florida adopted a liberal standard for admitting scientific testimony: whether "the tests in question were sufficiently reliable to justify their admission."⁵⁹

out of eight urinalysis specimens for drivers who registered a .00% breathalyzer reading showed methaqualone. Methaqualone is listed as a controlled substance in Florida Statutes section 893.03(2), Schedule II.

54. Gordon, *supra* note 53, at 8-14.

55. 405 So. 2d at 1004.

56. Florida Statutes section 316.1932(2)(a) (Supp. 1982) authorizes the Department to approve "tests determining the weight of alcohol"; section 316.1933 (Supp. 1982) authorizes the Department "to approve satisfactory techniques or methods" for determining alcoholic content of blood and section 316.1934(3) (Supp. 1982) provides that blood or breath tests to be considered valid must be performed by "methods approved by the Department of Health and Rehabilitative Services." There is no mention of authority to approve urine testing methods.

57. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), disapproving use of the systolic blood pressure deception test, a precursor of the polygraph.

58. 223 So. 2d 68 (Fla. 2d Dist. Ct. App. 1968), *appeal dismissed*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970).

59. *Id.* at 71. *Coppolino* concerned admission of chemical testing for succinylcholine chloride in the body. Before *Coppolino*, experts believed this was impossi-

In counties where urine testing has not yet gained judicial acceptance,⁶⁰ either test requires expert testimony about the reliability of the

ble to determine. However, two experts testified they had devised a method whereby determination was possible. Relying on their testimony, the results were admitted and the defendant found guilty of second degree murder. For different views of *Coppolino*, see F. BAILEY, *THE DEFENSE NEVER RESTS* 227-79 (1971); M. HELPERN, *AUTOPSY* 16-45 (1977).

Since the method used had not gained recognition among the scientific community - a pre-requisite under *Frye* - several writers argue *Coppolino* rejected *Frye* in favor of a lower "relevancy" standard:

'General scientific acceptance' is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed 'requirement of general acceptance' not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances.

C. McCORMICK, *EVIDENCE* 491 (Cleary ed. 1972). See also Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980). Gianelli criticizes both standards and urges requiring the state in a criminal case to establish a new scientific technique's reliability beyond a reasonable doubt.

Gianelli also criticizes the *Coppolino* standard for appellate review: "[the judge's] ruling on admissibility of evidence will not be disturbed unless an abuse of discretion is shown." *Coppolino*, 223 So. 2d at 70. He claims this confuses the judge's traditional discretion in accepting an expert's qualification with the acceptance of a new scientific process:

The answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case. It is therefore inappropriate to view this threshold question of reliability as a matter within each trial judge's individual discretion.

Gianelli, *supra* note 59, at 1223 (citing *Reed v. State*, 283 Md. 374, 381, 391 A.2d 364, 367 (1978) (voiceprint analysis inadmissible as not having achieved general acceptance in the scientific community.)) Gianelli claims the abuse of discretion standard makes a judge's decision to submit or exclude scientific evidence practically non-reversible. Following *Coppolino*, Florida appellate courts have never reversed for admission or exclusion of scientific evidence. See *infra* cases cited in note 61.

60. Neither *DeMoya* nor *Rafferty* addressed the particular method of testing's reliability. *DeMoya* only concerned blood testing for controlled substances, thus the particular method used there is not helpful.

Under the new law, Broward County will use a three level extraction procedure to

urine testing used.⁶¹ After a method's reliability has once been established, judicial notice could be used subsequently.⁶² Absent either method of proof, evidence of urinalysis is inadmissible. The Legislature should have delegated responsibility to the Department of Health and Rehabilitative Services to determine proper urine testing procedure. Only experience will determine whether the Legislature has created a problem by not doing so.

test urine. The first level is thin line chromatography; the second is the E.M.I.T. assay test for cocaine and benzodiazepines; the third level occurs subsequent to a positive second level test and is thin line chromatography confirmed by ultra-violet spectrophotometry. Dade County plans to use only gas chromatography. Telephone interview with Gene DeTuscan, Toxicologist, Broward County Medical Examiner's Office (July 6, 1982.)

61. After *Coppolino*, Florida courts have never mentioned *Frye* and adhere to the more liberal standard. See *Worley v. State*, 263 So. 2d 613, 614 (Fla. 4th Dist. Ct. App. 1972) (admitting voiceprint, "Florida courts have long enjoyed considerable discretion in the admittance of novel or experimental evidence, if they feel certain standards of scientific reliability have been attained."); *Rodriguez v. State*, 327 So. 2d 903, 904 (Fla. 3d Dist. Ct. App. 1976) (no error to exclude defendant's statements made under hypnosis because the "court remains unconvinced of the reliability of statements procured by way of hypnosis"); *Ashley v. State*, 370 So. 2d 1191 (Fla. 3d Dist. Ct. App. 1974) (no error to exclude psychological testimony); *Jent v. State*, 408 So. 2d 1024, 1029 (Fla. 1981) (admission of microanalysis showing unknown hair samples "highly likely" those of defendant depends upon "whether scientific tests are so unreliable and scientifically unacceptable that admission [is] error.")

For a detailed discussion of *Worley v. State*, admitting voiceprints see Comment, *Criminal Law: Voiceprint Evidence is Being Heard*, 25 U. FLA. L. REV. 608 (1973); Comment, *Criminal Law - Evidence - Voiceprints Admissible to Corroborate Testimony Identifying Accused As One Who Had Made False Bomb Threats By Telephone.—Worley v. State*, 263 So. 2d 613 (Fla. 4th Dist. Ct. App. 1972), 1 FLA. ST. U.L. REV. 349 (1973).

62. Judicial notice may take three separate forms: (1) Notice of prior decisions recognizing a method as reliable or unreliable, See *Reed*, 391 A.2d at 372-76 (1978); *State v. Primm*, 4 Kan. App. 2d 314, 606 P.2d 112 (1980) (judicial notice of general reliability of radar to measure speed); *Jent*, 408 So. 2d 1024 (judicially noticing earlier decision in *Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981) which admitted microanalysis). Under Florida Statutes section 90.201 judicial notice would be required of previous controlling decisions concerning a method; (2) Notice of the scientific literature in the area, see *Reed*, 391 A.2d 367; (3) Notice of expert testimony in prior opinions, see Gianelli *supra* note 59, at 1218-19 for a brief critique of all three methods. For detailed discussion of judicial notice in Florida see C. EHRHARDT, FLORIDA EVIDENCE §§ 90.201-207 (1977).

B. Non-forcible Blood Testing Provisions

Former Florida Statutes section 322.261(c)⁶³ allowed blood sampling when a driver could not take a breath test because of a mental or physical condition. Consent was implied and could not be withdrawn later. Any blood test taken either without a driver's consent or pursuant to section 322.261(2)(c) was inadmissible. Generally if no consent was given, the driver had to be unconscious. However, if serious enough physical injuries existed, and a driver was hospitalized, section 322.261 allowed blood sampling, since the driver was considered "so incapacitated as to render impractical or impossible the administration"⁶⁴ of the breath test.⁶⁵

Present Florida Statute section 316.1932(2)(c) retains these requirements. As originally amended, a driver had to be "advised as soon as practicable of such blood withdrawal and the intended use thereof"⁶⁶ and given the opportunity to withdraw his consent. This provision would have given drivers more rights than they previously had to exclude evidence, and placed them in an "all win-no loss" situation.⁶⁷ This modification clearly was not constitutionally required. In *Breithaupt v. Abram*⁶⁸ an unconscious driver objected to the use of his blood sample, but the Supreme Court found no constitutional obstacles. Likewise, *Filmon v. State*⁶⁹ rejected an argument that allowing con-

63. FLA. STAT. § 322.261(2)(c) (1981).

64. *Id.*

65. *State v. Bierbaum*, 46 Fla. Supp. 163 (Palm Beach County 1977), which held the state must show a driver's condition made requesting a breath test useless. Being at a hospital was insufficient. However, since there the driver was facially bleeding, complaining of pain and receiving emergency treatment, the showing was met. Likewise any blood test performed must be done "upon request of a law enforcement officer. . . ." FLA. STAT. § 316.1932(2)(c) (Supp. 1982). See *Campbell v. State*, 423 So. 2d 488 (Fla. 1st Dist. Ct. App. 1982), declaring inadmissible results of hospital blood tests performed to administer medical treatment and not at police officer's request.

66. See 1982 Fla. Sess. Law Serv. 155, § 3(West).

67. If blood tests register low blood alcohol content few drivers would withdraw consent. If the test showed a high blood alcohol level, most would withdraw consent and accept the consequences.

68. 352 U.S. 432 (1957).

69. 336 So. 2d 586 (Fla. 1976), *cert. dismissed sub nom. Filmon v. Florida*, 430 U.S. 980 (1980). The original Implied Consent Law was criticized for not giving

scious drivers to withhold consent but not permitting unconscious or incapacitated drivers to later do so violated equal protection.

Fortunately the legislature subsequently deleted this provision.⁷⁰ Thus unconscious or incapacitated drivers still cannot withdraw their consent to blood samples and exclude the test results.

C. General Provisions Concerning Validity of Blood Alcohol Content Analysis

Defendants charged with "drunk driving" offenses frequently contend proper administrative procedure has not been followed, thus making test results inadmissible. Former Florida Statutes section 322.262(3)⁷¹ provided in part that

Chemical analyses of the person's blood or breath, in order to be considered valid under the provisions of this section, must have been performed according to methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose.⁷²

Under prior case law, the state had the burden of showing testing provisions were followed.⁷³ Any analysis violating administrative rules

"equal treatment" to all drivers and may have led to the original amendment. *See* Comment, *Florida's 'Implied Consent' Statute: Chemical Tests for Intoxicated Drivers*, 22 U. MIAMI L. REV. 698, 716 (1968), which states, "A much fairer procedure would be to inform the unconscious person after he regains consciousness of his rights and at that time gave him a choice between having the evidence used against him or having his license suspended."

70. 1982 Fla. Sess. Law Serv. 403, § 3(West).

71. FLA. STAT. § 322.262(3) (1981).

72. *Id.*

73. *See* *State v. Wills*, 359 So. 2d 566, 568 (Fla. 2d Dist. Ct. App. 1978) ("statutes like Florida's . . . expressly condition the validity of test results on compliance with health department regulations."); *State v. Bender*, 382 So. 2d 697, 699 (Fla. 1980) ("test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules"). For civil cases, at least one Florida court has decided compliance with the administrative rules and statutory implied consent laws provisions is not required for admission of blood alcohol test results used to show a driver's comparative negligence. *Grant v. Brown*, 429 So. 2d 1229 (Fla. 5th Dist. Ct. App. 1983).

was inadmissible.⁷⁴ Results were excluded for the state's failure to establish intoximeter registration,⁷⁵ operator qualifications,⁷⁶ breathalyzer equipment's non-accessibility to unauthorized personnel,⁷⁷ and equipment's working condition.⁷⁸

Whether such results will occur under the new Implied Consent Law is questionable. Florida Statutes sections 316.1932(1)(b)⁷⁹ and 316.1934(3)⁸⁰ still authorize the Department to approve breath and blood testing procedure. However both sections provide that "Any insubstantial differences between approved techniques and actual testing

74. The Department of Health and Rehabilitative Services rules are in the Florida Administrative Code, chapter 10D-42, *Implied Consent*. These supplement the Department of Highway Safety and Motor Vehicles regulations. See FLA. ADMIN. CODE, ch. 15 B-3, *Rules of Administering and Determining Chemical Tests for Intoxication*.

75. See *Turk v. State*, 403 So. 2d 1077 (Fla. 1st Dist. Ct. App. 1981) (Florida Administrative Code, rule 10D-42.23 violated; unsigned photographic copy of machine registration certificate fails to satisfy both best evidence rule, as not under seal required by Florida statutes section 92.18, and hearsay rule since witness not qualified to establish copy as Business Record exception.)

76. See *Turk*, 403 So. 2d 1077 (Florida Administrative Code, rule 10D-42.25 violated, copy of certificate establishing breathalyzer operator's qualifications not properly authenticated); *Grala v. State*, 414 So. 2d 621 (Fla. 3d Dist. Ct. App. 1982) (blood test results improperly admitted, no proof of identity or qualifications of person who withdrew blood, admission harmless, evidence still sufficient to convict.) But see *Gillman v. State*, 390 So. 2d 62 (Fla. 1980) (blood sample drawn by hospital employee who not yet completed one year's required work for permanent licensing as clinical laboratory technologist improperly excluded; letter permitting temporary work as clinical laboratory technologist sufficient authorization).

⁶ 77. See *Wills*, 359 So. 2d at 568 (former H.R.S. rule 10D-42.07 requires only "reasonable compliance" and not insuring "impossib[ility] for anyone other than authorized personnel to obtain key" to drawer where machine kept; rule violated as multiple keys of unauthorized personnel unlocked gun locker where machine was); *State v. Dixon*, 50 Fla. Supp. 110 (Orange County 1980) (Highway Safety and Motor Vehicles rule 15B-3.03 rule violated; breathalyzer kept in open locker in room accessible to uncertified personnel).

78. See *Dixon*, 50 Fla. Supp. at 110 (machine removed from service eleven days after driver tested possibly not working properly when driver tested, failure to follow monthly inspection rule requires results exclusion). Florida trial courts have also recently excluded breath tests, because police radios may interfere with the breathalyzer machine accuracy. See *Radio interference causes breath tests to be thrown out*, Fort Lauderdale News, Dec. 12, 1982, at 18A, col 3.

79. FLA. STAT. § 316.1932(1)(b) (Supp. 1982).

80. FLA. STAT. § 316.1934(3) (Supp. 1982).

procedures in individual cases shall not render the test or test results invalid.”⁸¹

Unfortunately, what the legislature considered “insubstantial difference” is unclear. When certain procedures are administratively mandated, arguably any deviation is “substantial” or else they should not have been required. But to so construe section 316.1934(3) and 316.1932(1)(b) ignores the above quoted language. Since the integrity of a scientific testing process is concerned, the state should produce expert testimony about a deviation’s possible effect.⁸² This recognizes the burden case law places upon the state. Expert testimony would not be needed in all cases - only those in which the administrative regulations have not been followed.⁸³ Initially any testing procedure should be considered valid until the defense produces evidence showing deviation. The prosecution then must prove the deviation does not effect the overall results.

Another question is whether a judge or jury initially determines whether any difference is so “insubstantial” that test results are not invalid. While the answer is not clear, strong indications exist that the initial determination on admissibility of test results lies with the judge, with the ultimate determination on their validity left to the jury. *Copolino* established that the trial judge has wide discretion in admitting scientific evidence and must determine whether any proffered tests are “so unreliable and scientifically unacceptable that their admission into evidence was error”.⁸⁴ The key word is “unreliable”. Since standard breath and blood testing procedures were established to avoid this, any

81. FLA. STAT. § 316.1932(1)(b); FLA. STAT. § 316.1934(3).

82. Who qualifies as an expert on the question of “insubstantial differences” is another issue. Generally only breathalyzer technicians appear at drunk driving trials. They may not be qualified to testify what happens when differences in administrative or statutory procedures occur: “The technician merely follows prescribed routines, and is not expected to understand their underlying fundamentals. He knows how, but not why.” Kirk, *The Interrelationship of Law and Science*, 13 BUFFALO L. REV. 393, 394 (1964), cited in Gianelli, *supra* note 59, at 1214-15. Arguably a manufacturer’s representative is necessary.

83. See *Bender v. State*, 382 So. 2d 697, 699 (Fla. 1980): “When the prosecution presents testimony in evidence concerning motor vehicle driver intoxication, which includes an approved alcohol test method by a properly licensed operator, the fact finder may presume the test procedure is reliable. . . .”

84. 223 So. 2d 68, 70 (Fla. 2d Dist. Ct. App. 1968).

deviation from them could affect the results' reliability. *Coppolino* seems to embody the procedure mandated by Florida Statutes section 90.105, *Preliminary Questions*⁸⁵ stating in part: "(1) the court shall determine preliminary questions concerning . . . the admissibility of evidence."⁸⁶

If a difference between testing procedures used and those required by regulations is not "insubstantial", the results should be excluded and not considered by the jury. If the judge determines any differences would not affect the testing results' reliability, the jury is allowed to accept them or not.

Should the judge's initial determination be made in the jury's presence? Unfortunately section 90.105 does not afford a definite answer. Section 90.105(3) requires hearings outside the jury's presence only when confessions are involved. For other preliminary matters section 90.105(3) requires them to be held outside the jury's presence

85. *Coppolino* declared that

the question is not actually one of sufficiency or weight of the evidence for there was ample evidence before the jury to support its finding as to cause of death. *Instead, the question really involves the competency of the evidence.* That is, should the trial judge have allowed into evidence testimony concerning Dr. Umberger's tests.

Id. at 70, (emphasis added).

Subsequent Florida cases recognize the initial determination on scientific evidence is the judge's alone. See *Ashley v. State*, 370 So. 2d 1191 (Fla. 3d Dist. Ct. App. 1974) (evaluating questions of relevancy, materiality and competency for judge). *Jent v. State*, 408 So. 2d 1024 (Fla. 1981) (determination for court to make on reliability).

86. FLA. STAT. § 90.105 (1981). The section states in full:

Preliminary questions-

(1) Except as provided in subsection (2), the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.

(2) When the relevancy of evidence depends upon the existence of a preliminary fact, the court shall admit the proffered evidence when there is prima facie evidence sufficient to support a finding of the preliminary fact. If prima facie evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the subsequent introduction of prima facie evidence of the preliminary fact.

(3) Hearings on the admissibility of confessions shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be similarly conducted when the interests of justice require or when an accused is a witness, if he so requests.

"when the interests of justice require or when an accused is a witness, if he so requests."⁸⁷ Arguably, a defendant's testimony may sometimes be needed to meet the initial burden of producing evidence that some difference exists.⁸⁸ In these cases, the jury cannot be present. But when the defense shows a difference only through cross-examination of prosecution witnesses, the jury may be present.⁸⁹ Indeed judicial economy may be served by having jurors present. If results are ultimately submitted for their consideration, defense counsel can be expected to emphasize on cross examination the differences involved, hoping jurors will use them to disregard test results. Thus by having jurors present when the preliminary issue is determined, needless repetition of testimony is avoided.

What happens if the jury hears testimony on this preliminary question, and the judge excludes test results because a substantial difference exists? If the state dismisses its case, no harm is done. However, if the state continues, is a mistrial necessary? The answer seems to be "it depends." If the judge determines an instruction to disregard the excluded evidence would suffice, the trial can continue. If not, then mistrial is the only remedy.⁹⁰ By adding this new language, the Legisla-

87. FLA. STAT. § 90.105(3) (1981).

88. For example, the defendant could testify that during the twenty minute required observation period he drank liquid or vomited, thus affecting test results. See FLA. ADMIN. CODE, rule 10D-42.24.

89. An analogy may be drawn to admissibility of co-conspirator statements under the Federal rules of Evidence. Even federal courts which suggest preliminary foundations for co-conspirator statements should be done outside the jury's presence do not always require this procedure.

United States v. James, 576 F.2d 1121 (5th Cir. 1978), *reh'g en banc*, 590 F.2d 575 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1979), held Federal Rule of Evidence 104 (a) requires a judge to make determinations of the admissibility of co-conspirator statements under rule 801(d)(2)(E) "whenever reasonably practicable" before admitting the statements themselves. Subsequent decisions establish this procedure is not mandatory, and judges may admit co-conspirator statements subject to later "connecting up" at trial. See United States v. Miller, 664 F.2d 826 (11th Cir. 1981); United States v. Roe, 670 F.2d 956 (11th Cir. 1982).

90. Again, experience with the federal co-conspirator exception supports this. See *James*, 590 F.2d at 583 ("the judge must decide whether the prejudice arising from the erroneous admission of the co-conspirator's statements can be cured by a cautionary instruction to disregard the statement or whether a mistrial is required"); United States v. Ocanas, 628 F.2d 353 (5th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

ture has created much uncertainty. Prosecutors may find it wiser not to bring cases where any difference exists.

D. Florida Accident Report Privilege

Florida Statutes section 316.066,⁹¹ *Written Report of Accidents*, requires every driver involved in an accident causing one hundred dollars property damage or bodily injury to another person to file a written report with the Department of Highway Safety and Motor Vehicles. Likewise police officers investigating these accidents must make a report within twenty-four hours.⁹² To insure drivers' cooperation and to preserve their fifth amendment Privilege against Self-incrimination, section 316.066(4) provides in part that: "No such report shall be used in evidence in any trial, civil or criminal, arising out of an accident. . . ."⁹³

Early case law applied this provision to drivers' statements whatever form they took. The crucial consideration was whether the statements were made to fulfill either the driver's or the investigating officer's duty. Where an investigating officer recorded a driver's version of an accident to satisfy his reporting duties, admission was prohibited.⁹⁴ Likewise, when drivers made statements to investigating officers to satisfy their statutory duty, bystanders who overheard them could not testify.⁹⁵ However, only statements forming a basis for the report were privileged - not the entire report itself. Thus police could use accident reports to refresh their memory for purposes of testifying about non-privileged matters.⁹⁶

91. FLA. STAT. § 316.066(1) (Supp. 1982).

92. FLA. STAT. § 316.066(3)(a) (Supp. 1982).

93. FLA. STAT. § 316.066(4) (Supp. 1982).

94. *Stevens v. Duke*, 42 So. 2d 361 (Fla. 1949) (driver's oral statements to officer preparing accident report and driver's signed statement prepared by officer properly excluded as privileged in civil action arising out of accident).

95. *Herbert v. Garner*, 78 So. 2d 727, 728 (Fla. 1955) ("to allow one party to establish their contents by the testimony of witnesses who may have overheard the driver . . . making an oral report to the patrolman investigating it, would defeat the purpose of the statute").

96. *Lobree v. Caporossi*, 139 So. 2d 510, 512-13 (Fla. 2d Dist. Ct. App. 1962). See also *Soler v. Kukula*, 297 So. 2d 600, 602 (Fla. 3d Dist. Ct. App. 1974) (privilege not prevent cross-examination based on report, if officer used report to testify on direct

Besides a driver's oral statements, prior case law found privileged those blood tests taken to complete an accident report and not for possible criminal charges. Where blood tests were done to complete the accident investigation, the privilege attached and results excluded.⁹⁷ However, once an officer "changed his hat" and began a criminal investigation any consensual statements or blood tests were not protected.⁹⁸ Ultimately the crucial test for deciding whether statements or blood alcohol testing were within the privilege became "whether the information sought to be excluded was taken . . . for the purpose of making [an] accident report and formed a basis for that report."⁹⁹

Mere change from a civil to criminal investigation did not make test results admissible unless a driver was clearly advised of the change. An explicit warning easily achieves this; anything else is arguably insufficient, since "to do any less simply erodes the protection which the Legislature affords drivers".¹⁰⁰ Where one officer conducted both the civil and criminal investigations, the officer's warning to the driver usually sufficed.¹⁰¹ Where different officers were involved, whether the same officer or a different one requested the blood test was often crucial.¹⁰² The report's actual completion date or time was insignificant.¹⁰³

Under these interpretations of section 316.066(4) blood tests were excluded where their results would have provided significant evidence of intoxication. Case law construing the privilege as applied to blood

examination).

97. *Cooper v. State*, 183 So. 2d 269 (Fla. 1st Dist. Ct. App. 1966). *See also State v. Thomas*, 212 So. 2d 910 (Fla. 1st Dist. Ct. App. 1968).

98. *State v. Coffey*, 212 So. 2d 632, 634 (Fla. 1968) (no doubt driver [knew] investigation phase ended and blood being taken in connection with possible manslaughter charge).

99. *State v. Mitchell*, 245 So. 2d 618, 623 (Fla. 1971).

100. *Elder v. Ackerman*, 362 So. 2d 999, 1002 (Fla. 4th Dist. Ct. App. 1978) (report excluded since unrealistic for sixteen year old driver at serious accident scene "to discern the nuances of the dichotomy existing between investigations for automobile accident reports investigations from the criminal aspects of automobile accidents").

101. *Coffey*, 212 So. 2d 632.

102. *See State v. Edge*, 397 So. 2d 939 (Fla. 5th Dist. Ct. App. 1981); *Timmons v. State*, 214 So. 2d 11, 14 (Fla. 1st Dist. Ct. App. 1968), *cert. denied*, 396 U.S. 970 (1969).

103. *Mitchell*, 245 So. 2d 618.

alcohol testing has been criticized as illogical and inconsistent.¹⁰⁴ The new law significantly changes Florida Statutes section 316.066(4). Oral statements still remain privileged. However, chemical results are explicitly excluded from the privilege's scope: "The results of breath, urine and blood tests administered . . . shall not fall within the confidential privilege afforded by this subsection, but shall be admissible into evidence in accordance with the provisions of § 316.1934(2)."¹⁰⁵

This is one of the better changes. Chemical tests are outside the fifth amendment privilege against self-incrimination. If tests are otherwise validly taken, results should be admissible without privilege problems under section 316.066.

E. Admissibility of Refusals of Testing

Some states explicitly exclude¹⁰⁶ while many explicitly admit¹⁰⁷ refusals to submit to chemical testing. What happens when the state law is silent on this issue? Unfortunately, decisions have gone both ways.¹⁰⁸ Florida's situation before the new law's passage is typical of the confu-

104. See Note, *Admissibility of the Results of Blood Test in a Criminal Case Arising Out of an Auto Accident*, 22 U. MIAMI L. REV. 973, 978 (1968) ("The statutory accident report privilege should not be used in a manner that will cause the exclusion of evidence obtained under . . . implied consent law when an accident results,"); Rumrell, Wrights & Havens, *The Case for Admissibility of Blood Alcohol Test Results in Civil and Criminal Trials*, 55 FLA. B.J. 362, 365 (May, 1981) ("The court-created privilege against noncommunicative blood alcohol tests should be eliminated.").

105. FLA. STAT. § 316.066(4).

106. See, e.g., MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West, Supp. 1981).

107. See ALA. CODE § 32-A-5-194(c) (Supp. 1981); ARIZ. REV. STAT. ANN. § 28-692(H) (Supp. 1982). Besides Florida, three other states recently amended their Implied Consent laws to explicitly admit refusals. See ILL. REV. STAT. ch. 95 ½, § 11.501.2(c) (Supp. 1982); KAN. STAT. ANN. § 8-1001(c) (Supp. 1982); OR. REV. STAT. § 487.805(4) (1979).

108. [E]ven in those states . . . , which are silent on the issue of admissibility of a refusal to submit to the test, they come to opposite conclusions as to the effect of the statute. Some hold that the option given by the statute to refuse prevents the admissibility of evidence of the refusal, while others hold that even though a person may refuse to take the test, this is not a statutory right to refuse, and the evidence of such refusal is, therefore, not precluded by statute.

State v. Wilson, 5 Kan. App. 2d 130, ___, 613 P.2d 384, 386 (1980).

sion. The first Implied Consent Law made driving a privilege in return for which drivers impliedly consented to testing. Arrested drivers were warned any refusal to submit would result in license suspension,¹⁰⁹ but no statutory language said whether such refusal was admissible. Despite the original Implied Consent Law's passage, Florida courts did not allow admission of testing refusals.¹¹⁰

The new Florida Implied Consent Law explicitly makes admission

109. Former Florida Statutes section 322.261(1)(a) (1981) stated in part

Any person who shall accept the privilege extended by the laws of this state of operating a motor vehicle within this state shall by so operating such vehicle be deemed to have given his consent to submit to an approved chemical test of his breath for the purpose of determining the alcoholic content of his blood . . . Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle. . . .

But see State v. Gunn, 408 So. 2d 647, 649 (Fla. 4th Dist. Ct. App. 1981) (absence of warning did not merit suppression of results); Pardo v. State, 429 So. 2d 1313 (Fla. 5th Dist. Ct. App. 1983) (giving of warning not a prerequisite to valid blood alcohol test in criminal case; required only for imposition of license suspension for revocation of consent to testing).

110. State v. Duke, 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979), construed former Florida Statutes section 322.261(1)(a) in light of State v. Esperti, 220 So. 2d 416 (Fla. 2d Dist. Ct. App. 1969), *cert. dismissed*, 225 So. 2d 910 (Fla. 1969) admitting a refusal of nitrate testing as circumstantial evidence of guilt. *Esperti* distinguished Gay v. Orlando, 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1967) (holding that admissibility of refusal violated privilege against self-incrimination), *cert. denied*, 390 U.S. 956 (1968), finding the driver had been incorrectly given a choice to not submit, whereas in *Esperti* there was no choice given. Gay v. Orlando's conclusion was considered dicta and a due process rather than a privilege against self-incrimination decision. Since under Florida Statutes section 322.261(1)(a), a legal choice did not exist, *Duke* found refusals admissible.

However, in *Sambrine v. State*, 386 So. 2d 546 (Fla. 1980), the Florida Supreme Court declared

[a]ny careful reading of Section 322.261 leads to the inescapable conclusion that a person is given the right to refuse testing. If this were not so, it is unclear why the legislature provided for a definite sanction [license suspension] and a detailed procedure for the enforcement of such suspension.

Id. at 548.

Sambrine admittedly did not directly deal with the issue of testing refusals admissibility. Subsequent cases have applied it to this situation and consider it as disapproving *Duke*. See *Brown v. State*, 412 So. 2d 22 (Fla. 2d Dist. Ct. App. 1982).

a consequence of refusal. Florida Statutes section 316.1932(1)(a) provides that when a driver is "lawfully arrested" and police have "reasonable cause to believe" the driver is under the influence, "[r]efusal to submit to a chemical breath or urine test upon request . . . shall be admissible into evidence in any criminal proceeding."¹¹¹

However, despite this explicit language, admitting evidence of a refusal has until recently presented constitutional questions involving the privilege against self-incrimination. While this issue seems settled in favor of a refusal's admissibility, due process problems in doing so may still be very much alive. Thus discussion of both these areas is necessary.

The Florida and United States Supreme Courts have rejected all constitutional challenges to blood alcohol testing *per se*. Even before the first Implied Consent law's enactment, Florida addressed a Privilege against Self-Incrimination objection to blood sampling in *Touchton v. State*.¹¹² A vehicular manslaughter defendant had been arrested and taken to a hospital where blood used to show intoxication was taken. Rejecting claims that this procedure violated the Florida privilege against self-incrimination,¹¹³ the court noted the blood sample had not been protested. After *Touchton*, the propriety of blood extractions arose in *Schmerber v. California*¹¹⁴ where a hospital physician, acting under police direction, withdrew blood from an arrested driver, who protested based on advice of counsel. The Court acknowledged extracting blood over protest was 'compulsion' for fifth amendment purposes. However, the main issue was whether this required the driver "to be a witness against himself."¹¹⁵ Distinguishing between physical and testimonial evidence, the Court found no violation, holding "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide . . . evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analy-

111. FLA. STAT. § 316.1932(1)(a) (Supp. 1982).

112. 154 Fla. 547, 18 So. 2d 752 (1944).

113. At that time FLA. CONST. Declaration of Rights, § 12 provided in part: "No person shall be . . . compelled in any criminal case to be a witness against himself." This provision is presently contained in section 9, FLA. CONST. Declaration of Rights, Florida Constitution.

114. 384 U.S. 757 (1966).

115. *Id.* at 761.

sis . . . did not involve compulsion to these ends."¹¹⁶

Following *Schmerber*, Florida joined a number of states passing Implied Consent laws requiring drivers to submit to chemical testing through breath or blood sampling under certain conditions.¹¹⁷ In *State v. Mitchell*,¹¹⁸ a manslaughter defendant challenged a blood sample taken pursuant to former Florida Statutes section 322.261(1)(b)¹¹⁹ without his consent and before his arrest. Agreeing, the Second District Court of Appeal relied on the absence of consent to find a Privilege against Self-Incrimination violation.¹²⁰ The Florida Supreme Court reversed citing *Schmerber* where the blood sample taken over the driver's protest was not excluded on fifth amendment grounds. Subsequent cases extended *Mitchell* to breath tests as well.¹²¹

While *Schmerber* held a blood test does not violate fifth amendment principles, the Supreme Court created uncertainty about what would happen if a driver refused testing.¹²² Generally, courts have un-

116. *Id.*

117. For discussion of problems posed by the original Implied Consent Law, see Comment, *supra* note 69.

118. 245 So. 2d 618.

119. Former Florida Statutes section 32.261(1)(c) (1981) allowed blood extractions if a driver's physical condition made it "impractical" or "impossible" to administer other testing. See text accompanying note 58 for discussion of this provision.

120. 227 So. 2d 728 (Fla. 2d Dist. Ct. App. 1969).

121. See *State v. Bender*, 382 So. 2d 697 (Fla. 1980).

122. This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test-products which would fall within the privilege.***

Petitioner has raised a similar issue . . . , in connection with a police request that he submit to a 'breathalyzer' test He refused the request, and evidence of his refusal was admitted He argues that the introduction of this evidence and a comment by the prosecutor .. upon his refusal is ground for reversal under *Griffin v. California*, We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda v. Arizona* Since trial here was conducted after our decision in *Malloy v. Hogan*, . . . making those principles applicable to the States . . . petitioner's conten-

dertaken a two-step analysis in deciding whether statutes authorizing admission of refusal against a driver are constitutional: first considering whether admission would violate the Privilege against Self-Incrimination; and then, if necessary, considering whether admission would violate Due Process because either the driver has been misled into believing a right to refuse existed or because the refusal is of low probative value and its admission would unduly pressure drivers to testify. Each of these objections to admitting refusals is briefly discussed below.

1. *Privilege against Self-Incrimination*

Shortly after *Schmerber*, the California Supreme court decided two companion cases providing the main arguments against constitutional attacks. *People v. Ellis*¹²³ held admitting a defendant's refusal to speak for voice identification was permissible since the voice tests were physical evidence rather than testimonial evidence.¹²⁴ When the defendant wrongfully refused to do so, his refusal was admissible not as testimonial evidence but circumstantial conduct from which a jury could infer guilt, much like escape.¹²⁵ *People v. Sudduth*¹²⁶ applied this reasoning to refusals of breath testing. Since under *Schmerber* no right to

tion is foreclosed by his failure to object . . .

384 U.S. at 765-66 n.9.

As could be expected, this language has received differing interpretations from courts and commentators. Compare Comment, *The Admissibility of Refusals In Drunk Driving Prosecutions: A Violation of the Fifth Amendment*, 10 PAC. L.J. 141 (1978); and Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074 (1969) with Cohen, *The Case for Admitting Evidence of Refusal to Take a Breath Test*, 6 TEX. TECH L. REV. 927 (1975); Hauser, *Admissibility of Refusal to Submit to Blood Alcohol Test*, 6 NOVA L.J. 209 (1982); Arenella, *Schmerber and the Privilege against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982).

123. 421 P.2d 393, 55 Cal. Rptr 385 (1966).

124. "[T]he speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meaning of which are unimportant." *Id.* at 395, 55 Cal. Rptr. at 387.

125. "[I]t can scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence." *Id.* at 397, 55 Cal. Rptr. at 389.

126. 421 P.2d 401, 55 Cal. Rptr. 393 (1966).

refuse testing existed, comment on such refusal violated no constitutional privilege. Any contrary result encouraged destruction of evidence and escape from convictions.

The *Ellis-Sudduth* circumstantial evidence rationale has been used by most courts to find no constitutional violation.¹²⁷ However, shortly after *Sudduth*, Florida, in *Gay v. Orlando*,¹²⁸ became the first state subscribing to a contrary minority viewpoint. There, the admission of a driver's refusal to allow a breathalyzer test resulted in reversal of his conviction. The Fourth District Court of Appeal relied on *Schmerber* to find the refusal a testimonial by-product¹²⁹ and found compulsion because of the driver's situation, "a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement."¹³⁰ Whether by design or otherwise, *Gay v. Orlando* neither mentioned *Ellis* nor explained why it disapproved the refusal as circumstantial evidence analysis. While *Gay* has been much

127. See, e.g., *Campbell v. Superior court*, 106 Ariz. 542, ___, 479 P.2d 685, 692 (1971) ("person does not have a right to refuse and because refusal is not 'testimonial communication' . . . comment . . . not improper"); *City of Westerville v. Cunningham*, 150 Ohio St. 2d 121, ___, 239 N.E.2d 40, 41 (1968) ("reasonable to infer that a refusal . . . indicates the defendant's fear of the results of the test and his consciousness of guilt"); *Commonwealth v. Robinson*, 229 Pa. Super. 131, ___, 324 A.2d 441, 450 (1979); *State v. Meints*, 189 Neb. 264, ___, 202 N.W.2d 202, 203 (1972); *State v. Wilson*, 5 Kan. App. 2d 130, ___, 613 P.2d 384, 385 (1980) ("refusal[s] . . . could each be treated as an act or conduct indicating consciousness of guilt"; however excluded per state law). Some pre-*Schmerber* cases used the same analysis to admit refusals. *Gardner v. Commonwealth*, 195 Va. 945, ___, 81 S.E.2d 614, 618 (1954) ("merely details the behavior or conduct of the accused"); *State v. Benson*, 230 Iowa 1168, 1171, 300 N.W. 275, 277 (1941) ("the refusal was merely a circumstance to be considered."); *State v. Durrant*, 55 Del. 510, ___, 188 A.2d 526, 528 (1963) ("it is proper in a criminal case to show defendant's conduct . . . The fact that defendant declined to submit to a sobriety test is such a circumstance which a jury may consider.").

For two criticisms of the *Ellis-Sudduth* circumstantial evidence rationale see Comment, *supra* note 122, at 153-57 and Arenella *supra* note 122, at 46-47.

128. 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1967), *cert. denied*, 390 U.S. 956 (1968).

129. "[P]etitioners' statement was self-incriminating and carried an inference of guilt. In fact, it is difficult to see any relevancy . . . other than providing such an inference." *Id.* at 898.

130. *Id.*

criticized,¹³¹ several courts cited it to find admission of refusals a fifth amendment violation.¹³² Other cases have reached similar results.¹³³

131. See Hauser, *supra* note 122; Cohen, *supra* note 122; Comment, *Admissibility of Testimonial By-Products of a Physical Test*, 24 U. MIAMI L. REV. 50, 58-59 (1969) ("the decision is in conflict with the growing body of legal opinion").

132. See *Johnson v. State*, 125 Ga. App. 607, 188 S.E.2d 416 (1972); *State v. Jackson*, 637 P.2d 1 (Mont. 1981), *cert. granted, vacated and remanded for reconsideration*, Montana v. Jackson, 103 S. Ct. 1418 (1983). Arguably, *Johnson* could have relied on a non-constitutional evidentiary basis for excluding refusals, rather than a fifth amendment one, stating "[T]he refusal to take such tests are not relevant to the question of guilt or innocence although the statute itself authorizes the results to be allowed in evidence and creates a presumption in certain situations." 188 S.E.2d at 417. *Gay* excluded refusals not because of irrelevancy, but precisely because they were relevant, testimonial and compelled.

133. See *State v. Andrews*, 297 Minn. 260, 212 N.W.2d 863 (1973), *cert. denied*, 419 U.S. 881 (1974); *State v. Adams*, 247 S.E.2d 475 (W. Va. 1978).

The clearest articulation of the minority view is *Clinard v. State*, 548 S.W.2d 716 (Tex. Crim. App. 1977). *Clinard* first decided refusals were testimonial under general fifth amendment principles:

a defendant's silence or negative reply to a demand or request by an officer made upon him while under the necessary compulsion attendant with custodial arrest, which demand or question reasonably called for an immediate reply by the defendant, is clearly a tacit or overt expression and communication of the defendant's thoughts in regard thereto.

Id. at 718.

Clinard then, unlike *Gay*, addressed the circumstantial evidence argument and concluded it was erroneous.

[I]f an accused under custodial arrest is requested or offered a chemical test for intoxication, anything he does other than affirmatively agree to same is a refusal to submit. Thus, escape and flight are not 'compelled', a necessary factor under the Fifth Amendment, but a refusal to take a chemical test by silence or negative reply to a State's request or offer is compelled.

Id. at 718-19.

Few cases finding refusals admissible did more than merely cite the *Schmerber* footnote for the proposition that the issue was left undecided there. *Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969), *cert. denied*, 397 U.S. 966 (1970), relying on *Ellis* and *Sudduth* to find no privilege violation resulted from admitting refusals attempted to deal with the usually ignored *Schmerber* language. "The first portion . . . discusses an accused who incriminates himself 'when told that he would have to be tested'. . . . In context the Court seems here to be talking of an incriminating statement by the accused which is induced by the requirement that the test be taken. . . ." *Id.* at 518.

If no such statement was made, *Newhouse* considered the first part of the *Schmer-*

Fortunately the United States Supreme Court has recently resolved any question involving admissions of refusals and the fifth amendment Privilege against Self-Incrimination.

In *South Dakota v. Neville*,¹³⁴ an arrested driver declined a blood alcohol test after being warned several times that his refusal could lead to loss of driving privileges.¹³⁵ Before trial he successfully moved to suppress all evidence of the refusal. On the state's appeal from the suppression order, the South Dakota Supreme Court, while recognizing there may be no federal constitutional right to refuse blood-alcohol testing, determined a refusal's admission violated a driver's fifth amendment rights. The court first decided a refusal was a communicative act¹³⁶ for fifth amendment purposes and also decided the evidence

ber footnote inapplicable. Refusal was not a statement but conduct indicating a guilty conscience. In a curious bit of reasoning, *Newhouse* also found the second part inapplicable.

Read together, . . . the two portions . . . indicate that a refusal to take a blood test is not a testimonial 'statement' within the Fifth Amendment; rather, it is best described as conduct indicating a consciousness of guilt. See *People v. Ellis*. Nonetheless, the reference to the *Miranda* footnote can be read to imply that where an underlying right to refuse such a blood test is present, it would be improper to draw adverse inferences from failure of the accused to respond to a request . . . because the accused would thereby be penalized for exercising his rights to refuse the test.

Id. (footnotes omitted).

Newhouse implied such "underlying right" arose from state statutes or state constitutional decisions governing refusals. Close scrutiny demonstrates that such reasoning would have eliminated all federal constitutional considerations when deciding whether a refusal is admissible. If a statute or state constitutional decision gave a right to refuse testing, cases should be decided on the basis of the statutory language or state constitutional law, not federal constitutional principles. If so, then the Court's indication that "general Fifth Amendment principles" should apply in analyzing refusals to submit to breath testing would become meaningless.

134. 103 S. Ct. 916 (1983).

135. South Dakota's Implied Consent Law originally gave drivers the right to refuse breath testing, See S.D. COMP. LAWS ANN. § 32-23-10 (1973). Admitting a driver's refusal violated this statutory right. *State v. Oswald*, 90 S.D. 342, 241 N.W.2d 566 (1976). However the South Dakota legislature subsequently changed its Implied Consent Law to provide that "such refusal may be admissible into evidence at the trial." See S.D. COMP. LAWS ANN. § 32-23-10.1 (Supp. 1982).

136. "A defendant's silence or refusal to submit to a requested blood test is a tacit or overt expression and communication of defendant's thoughts." *State v. Neville*,

was "compelled" by the arrest circumstances.¹³⁷

Accepting certiorari to resolve the conflict among the states on this question, the United States Supreme Court reversed. The Court first noted *Schmerber* would clearly permit states to force suspected drivers to give blood alcohol tests and characterized the passage of implied consent laws as means "to avoid violent confrontations".¹³⁸ While acknowledging the *Ellis-Sudduth* argument that refusals are physical acts from which evidence of guilt can be circumstantially inferred rather than communications or testimony, the Court declined to rest its decision on this basis.¹³⁹ Instead the Court found "compulsion" for the fifth amendment purposes was not present based upon two factors. First, the Court noted "the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion'".¹⁴⁰ Clearly *Neville* did not present such a situation. Indeed, since the police respected the driver's refusal of testing, there was a total lack of physical force. Second, the Court noted the driver was clearly given a choice: submit to testing or have his refusal admitted at trial. The ultimate choice between the alternatives was made by the driver, not by the state. The mere fact that the driver was compelled by law to decide between these did not involve a fifth amendment violation. While not every situation where an individual is forced to choose between two alternatives will mean there is no "compulsion",¹⁴¹ since South Dakota could have lawfully eliminated

312 N.W.2d 723, 726 (1982) (citing *Gay v. Orlando*, 202 So. 2d 896 (Fla. 4th Dist. Ct. App. (1967) as authority).

137. In essence, the court found the driver caught between two choices: cooperating and possibly incriminating himself or refusing and possibly doing the same. *State v. Neville*, 312 N.W. at 726.

138. *Neville*, 103 S. Ct. at 921.

139. The Court most likely did so in order to avoid having to re-consider in future cases when consciousness of guilt could be fairly inferred from refusals and when it could not.

While we find considerable force in the analogies to flight and suppression of evidence . . . , we decline to rest our decision on this ground. As we recognized in *Schmerber*, the distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases. The situations arising from a refusal present a difficult gradation [between various types of refusals]."

Id. at 921-22 (footnote omitted).

140. *Id.* (citing *Fisher v. United States*, 425 U.S. 391, 397 (1976)).

141. The Court gave two examples when a choice would not avoid fifth amend-

any choice whatever and forcibly obtained the evidence, the mere fact it set up an alternative with possible unpleasant ramifications did not make any constitutional difference.¹⁴² Thus the Court held "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."¹⁴³

After *Neville*, the constitutionality of Florida Statutes section 316.1932(1)(a) is no longer debatable.

2. Due Process Grounds

Due process problems with admitting refusals may exist for two reasons. First, the driver may be misled about the right to refuse or consequences of refusal. Second, courts may feel refusals lack probative value and unfairly force drivers to offer explanatory testimony.

Drivers can be misled about their rights to refuse in a number of ways. The clearest instance occurs when an arrested driver is told he has the right to refuse testing even though state law grants none. Under such circumstances admitting a refusal would be unfair since its probative value is difficult to ascertain. The driver could be refusing because of fear of failing the test or merely due to a choice to take what was represented as a legal right. Indeed, writers disagreeing with *Gay v. Orlando's* discussion argue it is more properly interpreted on due process grounds.¹⁴⁴ Likewise in *State v. Duke*,¹⁴⁵ although the court found no statutory right to refuse testing, it decided the driver could have been misled by the arresting officer into believing he had a

ment problems: First, where a criminal defendant would be given the choice of either truthfully testifying involuntarily, falsely testifying thus risking perjury charges, or declining to testify thus risking contempt charges. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) and second, where the given alternative was so unpleasant a person would almost certainly admit guilt. See *Schmerber*, 384 U.S. at 765 ("a test so painful, dangerous or severe, or so violative of religious beliefs").

142. "[T]he choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Neville*, 103 S. Ct. at 923.

143. *Id.*

144. See Hauser, *supra* note 122, at 237-38; Comment, *supra* note 131, at 56-58.

145. 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979).

legal choice.¹⁴⁶ If *Miranda* warnings are given to an arrested driver, the driver may believe a refusal is allowed. Even pre-*Neville* cases holding admission did not violate the privilege against self-incrimination have recognized this possibility.¹⁴⁷ When this happens additional admonitions are almost universally required.

Situations may occur where a person in custody does not have fair notice of the limits of his rights, and becomes confused about whether he need comply with official directions. . . . where a driver exhibits confusion as to the scope of his rights, the officers should tell him of his duty to comply with directions or alternatively elaborate on their description of his rights.¹⁴⁸

Florida case law contains no requirement that an additional admonition be given that *Miranda* warnings do not provide a legal basis for refusal. However *Duke* implies that such a warning should be required to avoid misleading drivers.¹⁴⁹ Such warnings should be required; especially since now *Neville* decided that admitting refusals does not violate fifth amendment protections more states are likely to statutorily declare that refusals should be admissible.

Additionally, after *Neville*, one Due Process issue has been settled.

146. The arresting officer told the driver, "I am now offering to give an approved test of your breath for the purpose of determining the alcoholic content of your blood." *Id.* at 98. Emphasizing the officer's use of the word "offering", the court found "a reasonable person in the defendant's position could believe he had a Legal choice as to whether to submit to the test." *Id.*

147. See *People v. Ellis*, 421 P.2d 393, 55 Cal. Rptr. 393 (1966).

148. *Newhouse v. Misterly*, 415 F.2d 514, 518 (9th Cir. 1969), relying on the following language from *Ellis*

After having given [*M*]iranda warnings, if the police direct a defendant to speak for voice identification and he refuses, they must, as a prerequisite to the use of the defendant's refusal to speak as evidence of consciousness of guilt, advise him that the right to remain silent does not include the right to refuse to participate in such a test.

421 P.2d at 398-99.

See also *State Dept. of Highways v. Beckey*, 291 Minn. 483, 192 N.W.2d 441 (1971).

149. "The defendant should have been told that the officer was prepared to give an approved chemical test; that the driver did not have a right to refuse; but that if he did refuse that his driver's license would be revoked for a period of three months." 378 So. 2d at 98.

Besides raising Privilege against Self-Incrimination arguments, the driver claimed Due Process was violated, because he was not told his refusal could be used at trial. The driver argued his situation was analogous to that in *Doyle v. Ohio*¹⁵⁰ where the Court found admitting a defendant's silence after receiving *Miranda* warning was fundamentally unfair. The Court rejected this for two reasons. First, "the right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be burdened."¹⁵¹ The driver's right to refuse did not arise from any constitutional right but from a statute existing only through legislative grace. Second, *Miranda* warnings emphasized the disadvantages of speaking, not any adverse consequences from silence. In *Neville*, the statutory warning about potential loss of driving privileges, "contained no such misleading assurances as to the relative consequences of his choice."¹⁵² Indeed, if anything, the assurances were in the opposite direction—refusal would lead to state action to suspend the driver's license.¹⁵³ Thus after *Neville*, mere failure to warn that refusal of testing is admissible against the driver at trial does not violate due process rights.

Although Florida law, like South Dakota's, provides that refusal of testing is admissible, no statute requires the driver be so informed. After *Neville*, the question still remains whether a warning should not be legislatively required although its absence is admittedly not constitutionally fatal. Why such a requirement is omitted is puzzling, considering how easy it would be to give such a warning. Police officers have found no difficulty complying with the *Miranda* warnings in similar circumstances. Moreover, whether drivers should be warned of a refusal's consequences should be considered in connection with Florida Statutes section 316.1932(a)¹⁵⁴ stating "A warning of the consent provision of this section shall be printed above the signature line on each new or renewed driver's license issued after the effective date of this

150. 426 U.S. 610 (1976).

151. *Neville*, 103 S. Ct. at 923.

152. *Id.* at 924.

153. "It is true the officers did not inform respondent of the further consequence that evidence of refusal could be used against him in court, but we think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur." *Id.*

154. FLA. STAT. § 316.1932(e) (Supp. 1982).

act.”¹⁵⁵

Additional language should be included that any refusal of consent would be admissible in court. Even commentators arguing refusals should be admissible agree drivers should be so warned.¹⁵⁶ One state supreme court requires such warnings.¹⁵⁷

States viewing refusals probative of a guilty conscience see no due process problem in admitting them and possibly forcing drivers to testify. Other states have questioned the probative value of refusals. The Supreme Court in *Schmerber* recognized that some factual circumstances cast considerable doubt on a refusal's relevance, although *Schmerber* having no concerns based on fear, health or religion, did not present such a situation.¹⁵⁸

Some courts consider only these instances,¹⁵⁹ but others recognize additional circumstances when admission would be unfair.¹⁶⁰ The only empirical study examining reasons for refusals concludes they stem from unknown sources.¹⁶¹ One Florida writer argues that forcing driv-

155. *Id.*

156. See Hauser, *supra* note 122, at 236-38; Arnella, *supra* note 122, at 57, n.130. Indeed *Neville* suggests such should be done even though not constitutionally required: “Since the State wants the suspect to submit to the test, it is in its interest fully to warn suspects of the consequences of refusal. We are informed that police officers in South Dakota now warn suspects that evidence of their refusal can be used against them in court.” 103 S. Ct. at 924, n.17.

157. *Puller v. Municipality of Anchorage*, 574 P.2d 1285 (Alaska 1978); See also *State v. Parker* 16 Wash. App. 632, —, 558 P.2d 1361, 1363 (1976) (“had the statute intended evidentiary use of . . . refusal, it is logical that the arresting officer would be required to inform [a driver] refusal could be used in a criminal proceeding”).

158. 384 U.S. at 771. *Neville* did not overrule this language.

159. See *Ellis*, 421 P.2d at 398.

160. See, e.g., *State v. Adams*, 247 S.E.2d 475, 478 (W. Va. 1978) (“where there is no explanation of defendant's refusal offered, the evidence is untrustworthy. . . . Defendant could have been afraid of the test itself and not the results. . .”); *State v. Jackson*, 637 P.2d 1, 3 (Mont. 1981) (“not always reliable, and is highly prejudicial to the defendant, in effect forcing him to take the witness stand to explain. . .”).

161. Argeriou, *Refusal to Take Breathalyzer Test-Rebutting Adverse Presumption*, 11 CRIM. L. BULL. 350 (1975). This study of 281 drunk driving offenders using ten variables to compare test takers versus nontakers concludes there is “little support for the assumption that individuals who refused . . . did so as a result of heightened ‘consciousness of guilt’ and a conscious desire to avoid providing additional and specific chemical evidence of their level of intoxication.” *Id.* at 353.

ers to offer explanations does not violate due process.¹⁶² However, this is predicated on the belief the defendant could only be cross-examined on the reasons for refusal, if he does not testify on other matters. Arguably Florida Statutes section 90.612(2)¹⁶³ allows for this. However this argument ignores the last sentence, "The court may, in its discretion permit inquiry into additional matters."¹⁶⁴

When discretion is exercised to allow widened cross-examination, is reversal likely? Based on one recent case, the answer must be "no". In *MaGahee v. Massey*,¹⁶⁵ the Eleventh Circuit reviewed a Florida rape conviction. MaGahee was accused of attacking the victim on October 11, 1973. To prove he was the perpetrator, the state offered testimony of another witness that the defendant exposed himself one month before at the same place the rape occurred. MaGahee testified not about the events of October 11th, but that he was elsewhere at the earlier time. When cross-examination went beyond this, defense counsel's objection was overruled. Additionally, the prosecutor commented in closing argument about McGahee's failure to testify about the October 11th events. Both the Fourth District Courts of Appeals and the Florida Supreme Court affirmed without opinions.¹⁶⁶ The Eleventh Circuit denied a habeas corpus petition which argued that extended cross-examination violated fifth amendment privileges, since it considered these waived when McGahee voluntarily chose to testify. The court distinguished this situation from instances where the defendant, by testifying on collateral matters, does not open up the cross-examination.¹⁶⁷ Once

162. Hauser, *supra* note 122, at 239.

163. Florida Statutes section 90.612(2) (1981) states in part "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness."

164. *Id.*

165. 667 F.2d 1357 (11th Cir. 1982).

166. *McGahee v. State*, 302 So. 2d 835 (Fla. 4th Dis. Ct. App. 1974), *cert. denied*, 311 So. 2d 671 (Fla. 1975).

167. *Calloway v. Wainwright*, 409 F.2d 59 (5th Cir. 1969), *cert. denied*, 395 U.S. 909 (1969) was cited as an example of a collateral matter. *Calloway* found that by testifying solely to a confession's circumstances, a defendant does not open up himself up to cross-examination or comment in closing argument on failure to testify about other matters. The line is a fine one and easily crossed. *See also United States v. Hearst*, 563 F.2d 1331, 1338-40. (9th Cir. 1977) (limiting the *Calloway* collateral matter versus merits distinction to confessions alone, defendant's testimony to post-robbery

a defendant testifies about the “merits”, the cross-examination becomes full-bloom. In *McGahee* this happened once the defendant testified on the element of identity.

Refusal of chemical testing surely will not be considered a collateral matter. Since the refusal is likely to happen at the arrest scene, courts may easily surmise that by testifying about this, the defendant opens himself up to cross-examination about everything happening at the scene. Moreover, if courts consider refusal relevant to show a guilty conscience, explaining why a person refused goes directly to the “merits”.

If Florida decides refusals should be admissible in certain cases, better procedure would be to utilize Florida Statutes section 90.105,¹⁶⁸ *Preliminary Questions*. Since the Supreme Court indicated admitting refusals under certain circumstances violates due process, initial screening of reasons for refusal should be done at preliminary hearings. Initial decisions about a confession’s voluntariness are solely for a judge.¹⁶⁹ However, due process does not require a hearing outside the jury’s presence in every case of alleged suggestive identification since determining an identification’s reliability is a traditional jury role.¹⁷⁰ However such hearings are “advisable” and sometimes “constitutionally necessary”.¹⁷¹ The issue of admitting testing refusal is significantly different from a suggestive identification question. Other witnesses, especially the victim, are available for examination in an identification case. However, in a refusal issue the driver is likely to be the only one knowing why he refused the test.¹⁷² Forcing drivers to testify before a jury on this would possibly subject them to extended cross-examination and unfavorable inferences from not testifying on other matters.

public admissions of participation goes to merits), *cert. denied*, 435 U.S. 1000 (1978).

168. FLA. STAT. § 90.105, *Preliminary Questions* (1981).

169. *Jackson v. Denno*, 378 U.S. 368 (1964). This is necessary since a jury might focus on the confession’s reliability and not its voluntariness or be influenced in the voluntariness decision by need to use the confession in evaluating a defendant’s guilt.

170. *Watkins v. Sowders*, 449 U.S. 341 (1981).

171. *Id.* at 349.

172. One exception might be where the driver refused for medical reasons. Then a doctor could supply the needed explanation.

Florida Statutes section 90.105(1)¹⁷³ obligates judges to decide “preliminary questions concerning” the admissibility of evidence. If the defendant wishes to testify concerning his reason for refusal, the second sentence of section 90.105(3)¹⁷⁴ should require a preliminary hearing. If the court finds refusal was for a valid reason, the refusal should be excluded.¹⁷⁵ If the state meets its burden of disproving this¹⁷⁶ a refusal would be submitted to a jury for consideration of its weight. Thus drivers would be given some opportunity to demonstrate valid grounds for refusal and not have to worry about waiving their fifth amendment rights not to testify at trial.¹⁷⁷

IV. CURRENT CONSTITUTIONAL ISSUES

A. Forcible Blood Sampling

Florida courts have condemned taking blood samples from protesting drivers. However all cases excluding forcible blood extractions were based on the original Implied Consent Law’s language. Former Florida Statutes’ section 322.261(1)(c)¹⁷⁸ allowed blood tests when a driver was “so incapacitated as to render impractical or impossible the administration”¹⁷⁹ of a breath test and acceptable medical standards were followed. This provision has been retained by the new law.¹⁸⁰ When blood sampling was done contrary to these provisions, the sample

173. See FLA. STAT. § 90.105(1) (1981).

174. FLA. STAT. § 90.105(3) (1981).

175. Not all courts agree reasons for refusal are a matter for courts initially. See *Commonwealth v. Robinson*, 324 A.2d 441 (Pa. 1979), considering this a jury issue.

176. See *Lego v. Twomey*, 404 U.S. 477 (1972), prosecution has burden of proving voluntariness of confession by preponderance of the evidence. Cf. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975) suggesting that for confessions, dying declarations and some declarations against interest, the beyond a reasonable doubt standard should be used for preliminary fact-finding.

177. Another alternative is to make refusals admissible only if the defendant testifies and not in the state’s case-in-chief. Two states adopt this compromise approach. See R.I. GEN. LAWS § 31-27-2 (Supp. 1981); N.D. CENT. CODE § 39-20-08 (1980).

178. FLA. STAT. § 322.261(1)(c) (1981).

179. *Id.*

180. See *supra* text accompanying notes 65-70 for discussion of temporary changes made in section 322.261(1)(c), now section 316.1932(2)(c).

results were excluded.¹⁸¹

The Supreme Court has viewed unfavorably due process and fourth amendment arguments against non-consensual blood testing. *Breithaupt v. Abram*,¹⁸² found a physician's blood extraction from an unconscious driver in a hospital emergency room "would not be considered offensive by even the most delicate."¹⁸³ However, the *Rochin v. California*¹⁸⁴ situation where police illegally broke into a suspect's home and forcibly pumped his stomach to make him regurgitate narcotics and shocked the court's conscience as "brutal"¹⁸⁵ and "offensive"¹⁸⁶ was distinguished from *Breithaupt* where no force other than puncturing the skin occurred. This intrusion was considered small when balanced against society's interest in detecting and deterring intoxicated drivers. *Breithaupt* emphasized that due process violations depend not on personal reaction to a particular procedure but on what the community considers offensive. Emphasizing the routineness of such procedures, along with the states' widespread acceptance of blood extractions,¹⁸⁷ the Court concluded they were "not such 'conduct that shocks the conscience' . . . nor such a method of obtaining evidence

181. In *State v. Riggins*, 348 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1977), *cert. dismissed*, 362 So. 2d 1056 (Fla. 1978), blood was forcibly taken from a resisting driver. The court found "the implied consent evidenced by accepting the privilege of operating a motor vehicle in this state may be revoked at the time the chemical test is suggested. . . . Otherwise the sections providing for suspension upon refusal to submit would be superfluous." *Id.* at 1210-11.

Likewise in *Sambrine v. State*, 378 So. 2d 96, blood was withdrawn from a driver who refused a breathalyzer test. Disagreeing with the state's argument that only probable cause was needed, the court noted former section 322.1262(1)(c) provided for blood sampling only when a driver was mentally or physically incapable of withdrawing the implied consent. *See also* *Brown v. State*, 371 So. 2d 161 (Fla. 2d Dist. Ct. App. 1979), *aff'd per curiam*, 386 So. 2d 549 (Fla. 1980); *Lytwyn v. State*, 353 So. 2d 222 (Fla. 1st Dist. Ct. App. 1977); *McDonald v. State*, 364 So.2d 1241 (Fla. 2d Dist. Ct. App. 1978), excluding blood tests taken in violation of the Implied Consent Law.

182. 352 U.S. 432 (1957).

183. *Id.* at 436.

184. 342 U.S. 165 (1952).

185. *Id.* at 172.

186. *Id.* at 174.

187. Forty-seven states had approved chemical intoxication testing through either caselaw or statutes. Among the cases cited was *Touchton v. State*, 18 So. 2d 752 (Fla. 1944).

that it offends a 'sense of justice.'"¹⁸⁸ Subsequently *Schmerber v. California*¹⁸⁹ likewise rejected a fourteenth amendment due process objection to blood extractions taken over a conscious driver's protest. In *Schmerber*, the driver was conscious and had verbally, but not physically, protested the extraction. The Court refused to distinguish between invading the skin to secure blood samples of conscious as opposed to unconscious drivers.¹⁹⁰

Schmerber also considered fourth amendment objections to blood extractions. The Court recognized blood extractions involve a search and seizure¹⁹¹ but focused on whether they were "unreasonable" under the circumstances. Probable cause based upon the smell of Schmerber's breath and his general physical appearance supplied justification. Since delay in getting a warrant threatened loss of evidence, none was required. Likewise the procedures used were reasonable because blood sampling is generally effective in determining blood alcohol content and the procedure as performed by a doctor in a hospital, comported with standard medical practices. Fourth amendment objections to Florida's Implied Consent law fared no better than fifth amendment claims. *State v. Mitchell*¹⁹² rejected fourth amendment arguments that arrest was needed before blood could be taken, and recognized that the question was rather the "relevance and likely success" of a blood test.¹⁹³

188. 352 U.S. at 437.

189. 384 U.S. 757 (1966).

190. "We 'cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.'" *Schmerber*, 384 U.S. at 760, n.4 (citing *Breithaupt v. Abram*, 352 U.S. at 441 (Warren, J., dissenting)).

191. The seizure occurred when Schmerber was arrested at the hospital, followed by the search which occurred when blood was taken from his body.

192. 245 So. 2d 618 (Fla. 1971).

193. *Id.* at 622 (citing *Schmerber v. California*, 384 U.S. 757, 769 (1966)). See also *Filmon v. State*, 336 So. 2d 586 (Fla. 1976), *cert. dismissed sub. nom.*, *Filmon v. Florida*, 430 U.S. 980 (1980); *State v. Edge*, 397 So. 2d 939 (Fla. 5th Dist. Ct. App. 1981). *But see United States v. Harvey*, 701 F.2d 800 (9th Cir. 1983) construing blood sampling in *Schmerber* as a search incident to lawful arrest, thus requiring formal arrest before blood extraction unless consent given. Several states have upheld blood samples from unconscious drivers on a different basis. In *Aliff v. State*, 627 S.W.2d 166 (Tex. Crim. 1982), blood taken from an unconscious driver was admitted over his fourth amendment objections. The court agreed *Schmerber* was distinguishable since there the driver was both under arrest and conscious. However the court justified the

After *Breithaupt* and *Schmerber*, there is no constitutional problem with extracting blood from an unconscious or verbally protesting driver. Other situations may present difficulties however. The new "drunk driving" law adds a section on blood sampling going beyond *Breithaupt* and *Schmerber*. Florida Statutes section 316.1933,¹⁹⁴ *Blood Test for Impairment or Intoxication* states in part:

(1) Notwithstanding any recognized ability to refuse to submit to [breath or urine tests] or any recognized power to revoke the implied consent to such tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person while under the influence of alcoholic beverages or controlled substances has caused the death or serious bodily injury of a human being, such person shall submit, upon request of a law enforcement officer, to a test of his blood for the purpose of determining the alcoholic content of his blood or the presence of controlled substances. The law enforcement officer may use reasonable force, if necessary to require such person to submit to the administration of the blood test.***¹⁹⁵

Whether the provision allowing police to "use reasonable force, if necessary" constitutionally affords an arrested driver due process is questionable. As mentioned above, *Breithaupt* and *Schmerber* both rejected due process violations. However, neither case covers the situation contemplated by section 316.1933. Indeed *Schmerber* noted three situations where section 316.1933 presents problems. "It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to

sampling based on *Cupp v. Murphy*, 412 U.S. 291 (1973), which upheld taking fingerprint scrapings from an unarrested defendant. *Aliff* noted both the routiness of blood testing and the possibility evidence would be lost if delay ensued. This presented exigent circumstances justifying the warrantless search. See also *State v. Oevering*, 268 N.W.2d 68 (Minn. 1978); *DeVaney v. State*, 259 Ind. 483, 288 N.E.2d 732 (Ind. 1972); *Van Order v. State*, 600 P.2d 1056 (Wyo. 1979); *State v. Campbell*, 615 P.2d 190 (Mont. 1980); *State v. Heintz*, 286 Or. 239, 594 P.2d 385 (1979) relying on similar reasoning to uphold blood sampling from severely injured or unconscious drivers.

194. FLA. STAT. § 316.1933 (Supp. 1982).

195. *Id.* at (1). "Serious bodily injury" is defined as "a physical condition which creates a substantial risk of death or serious, personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.*

resistance with inappropriate force".¹⁹⁶

Arguably, the easiest situation to resolve occurs when a driver protests blood extraction and makes "a reasonable request to undergo a different form of testing."¹⁹⁷ *Schmerber* specifically notes several reasons a driver would do so: "Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple, might prefer some other means of testing, such as the 'breathalyzer' test petitioner refused."¹⁹⁸

Does Florida Statutes section 316.1933 require arresting officers to first offer other tests or administer them if requested? The key language appears in Florida Statutes section 316.1933's beginning: "Notwithstanding any recognized ability to refuse to submit to the tests provided in Fla. Stat. § 316.1932. . . ."¹⁹⁹ Thus whether a driver is capable of giving a breath or urine sample appears irrelevant if probable cause exists and serious bodily injury to another occurred. This language clearly conflicts with the *Schmerber* dictum. Police may desire blood samples because of their recognized reliability.²⁰⁰ However when the desire to obtain blood conflicts with an individual's reasonable desire for other testing methods, the alternatives should be constitutionally required. Under such conditions, *Schmerber* implies that no amount of force, no matter how slight, is "reasonable". Several states have recognized *Schmerber's* dictum by prohibiting blood sampling in these circumstances.²⁰¹ Forcibly taking blood when these arise violates

196. 384 U.S. at 760, n.4. This language was again cited with approval in *Neville* as examples of situations which could present Due Process problems. See 103 S. Ct. at 921, n.9.

197. 384 U.S. at 760, n.4.

198. *Id.* at 771.

199. FLA. STAT. § 316.1933 (Supp. 1982).

200. Blood testing is generally considered the most reliable, followed by breath testing and then urinalysis. See Fitzgerald & Hume, *The Single Chemical Test for Intoxication: A Challenge to Admissibility*, 66 MASS. L. REV. 23 (1981); A. MOENSSENS & F. INBAU, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* §§ 2.04-2.07 (2d ed. 1978). Ironically *Perryman v. State*, 242 So. 2d 762 (Fla. 1st Dist. Ct. App. 1971), upheld the propriety of denying blood tests to a driver who previously refused breath testing.

201. See CAL. VEH. CODE § 13353(d), (e) (Deering 1972) exempting from blood testing hemophiliacs and persons taking anticoagulants for a heart condition; R.I. GEN. LAWS § 31-27-2.1 (1982) exempts religious objectors.

due process, despite Florida Statutes section 316.1933's authorization.

The remaining two situations *Schmerber* contemplates involve the same question, what is "reasonable force"? A literal reading of "if the police initiated the violence,"²⁰² could prevent use of *any* force once a driver refuses. Since *Schmerber* also used the words "or responded to resistance with inappropriate force,"²⁰³ the prior language should be read as "if the police initiated the [unnecessary] violence."²⁰⁴ Since blood extractions involve searches and seizures, some courts after *Schmerber* feel the question of "reasonable force" involves fourth amendment considerations rather than due process ones.²⁰⁵ Where force is reasonable for fourth amendment purposes, it would satisfy due process.

"Reasonableness" must be considered separately under each set of facts. As stated by one court "[t]here is no slide-rule formula yet devised for ascertaining whether specific conduct is or is not reasonable."²⁰⁶ Courts have considered searches of the body's exterior differently from searches involving invasions of the body's interior. Greater justification is required when the body is invaded and the force used to make such an invasion should be closely scrutinized.²⁰⁷ Unfortunately, after *Schmerber*, few cases address the constitutionality of forcible blood extractions. Many are decided on other issues, such as violations of state Implied consent laws. Florida can no longer consider blood sampling solely in statutory violation terms when the section 316.1933's conditions exist. Thus examination of case law dealing with other bodily invasions is needed.

Bodily invasions are common in narcotics border searches. While

202. 384 U.S. at 760, n.4.

203. *Id*

204. *Id*.

205. See *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); *People v. Bracamonte*, 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975). Even before *Rochin*, *Breithaupt* and *Schmerber*, one writer argued courts were merging due process and fourth amendment "reasonableness" standards. Bachelder, *Use of Stomach Pump as Unreasonable Search and Seizure*, 41 CRIM. L. & CRIMINOLOGY 189 (1950).

206. *Blackford*, 247 F.2d at 751.

207. See *Brent v. White*, 398 F.2d 503 (5th Cir. 1968) (penis scraping to obtain victim's menstrual blood permissible search incident to lawful arrest involving no intrusion of body's surface), *cert. denied*, 393 U.S. 1123 (1969).

there is often official force used to search the person's body, the courts have usually upheld the constitutionality of the law enforcement actions involved. Shortly after *Breithaupt*, *Blackford v. United States*²⁰⁸ challenged the forcible extraction of narcotics from a defendant's rectum. Blackford was forcibly restrained and undressed, then subjected to an unsuccessful anal probe. Following this, several forcibly given enemas resulted in recovery of narcotics. Applying a "reasonableness" test claimed to be stricter than a due process scrutiny, the Ninth Circuit found substantial factual similarity to *Breithaupt* and many differences with *Rochin*.

Rochin was subjected to a whole series of abuses and violations of his rights commencing with the unlawful entry into his dwelling, continuing with the forcible attempt by the officers to prevent him from swallowing the capsules, and culminating with the forcible stomach pumping. In contrast, Blackford was treated civilly throughout and was subjected to physical pressure only when the examinations were to be performed.²⁰⁹

The court dismissed claims the procedures used inflicted unreasonable pain. As long as the infliction was not malicious or excessive no problem existed. Numerous cases have relied on *Blackford's* interpretation of *Rochin* and upheld anal searches,²¹⁰ emetics,²¹¹ and stomach pumping²¹² to force narcotics from a suspect's body.

Like body searches at the border, operations to recover bullets from a defendant's body involve fourth amendment and due process issues. Generally, the courts have upheld such procedures. In *United States v. Crowder*,²¹³ an operation to recover a bullet from the defen-

208. 247 F.2d 745.

209. *Id.* at 752.

210. See *Denton v. United States*, 310 F.2d 129 (9th Cir. 1962); *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965).

211. See *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963), *cert. denied* 381 U.S. 920 (1965); *Barrera v. United States*, 276 F.2d 654 (5th Cir. 1960); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

212. *Belfare*, 362 F.2d 870. Cf. *People v. Bracamonte*, 540 P.2d 624 (non border search found unreasonable because no warrant obtained, unnecessary to consider due process issue).

213. 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

dant's arm was permitted. The operation was a minor surgical procedure done under acceptable medical conditions, with probable cause to believe it would produce relevant evidence.²¹⁴

Are border searches and operations distinguishable from blood sampling? All involve bodily invasion. Border searches and operations for bullets are necessary to obtain evidence which may not be obtainable otherwise. However, in regard to blood alcohol testing less intrusive breath and urine tests exist. Moreover, to some people blood sampling will be more dangerous than minor operations or border search devices. Yet since section 316.1933 gives police authority to require blood sampling as long as "reasonable force" is used the driver has no opportunity to prevent being exposed to the danger. Although in blood sampling the Supreme Court recognizes delay will result in loss of evidence, this relates only to the need for testing, not the exact method chosen. A recent New York case illustrates this important distinction. *Matter of Abe A.; Jon L. v. District Attorney*,²¹⁵ upheld an order requiring blood samples needed to connect the defendant with his business partner's murder. Blood at the scene was of two types; the victim's and a rare kind belonging to one percent of the population. After deciding probable cause existed and safe medical procedures would be used, the court noted that "no alternative means of obtaining the evidence was brought forward. . ."²¹⁶ This situation contrasts greatly with the usual drunk driving case where alternatives are available to determine blood alcohol content. Measured by this criteria, section 316.1933 cannot withstand constitutional scrutiny.

A few cases exclude blood samples because of due process violations resulting from either police initiated force or unnecessary force in

214. Before the operation, a warrant was issued approving only the recovery of a bullet in the arm. A second bullet was left undisturbed, since an operation to secure this presented danger of permanent damage. *See also* *State v. Overstreet*, 551 S.W.2d 621 (Mo. 1977); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (Ga. 1972), *cert. dismissed*, 410 U.S. 975 (1973); *State v. Allen*, 291 S.E.2d 459 (S.C. 1982); *State v. Martin*, 404 So. 2d 960 (La. 1981). *Contra* *Indiana v. Adams*, 229 N.E.2d 834 (Ind. 1973), *cert. denied sub nom.*, 415 U.S. 935 (1974), adopting *per se* rule that surgical removal of bullets violates fourth amendment.

215. 56 N.Y.2d 288, 437 N.E.2d 265 (1982).

216. *Id.* at ___, 437 N.E.2d at 271.

response to a suspect's resistance. In *People v. Kraft*,²¹⁷ while the actual procedure used to extract blood was medically safe, the surrounding circumstances made the process medically unacceptable. Police arrested Kraft after an accident and took him to a local hospital handcuffed. One officer punched Kraft to force him into the hospital, without any good reason for doing so. Once the handcuffs were removed, the driver objected to the blood extraction on morality grounds. When he resisted, his arms were grabbed and he was led to an examination room where he was pushed onto the floor and held down by two officers until blood was taken. The court found the police "were aggressive beyond all need."²¹⁸ Likewise, in *United States v. Townsend*,²¹⁹ the defendant was beaten without explanation and had his arms twisted when he resisted efforts to scrape his penis for blood samples in a rape case. Citing *Rochin*, the court found this violated due process.

Kraft and *Townsend* demonstrate the excessive police action Florida Statutes section 316.1933(1) may generate.²²⁰ Why did the legislature pass such a provision considering other sections of the new Implied Consent law? Breathalyzers show the same results as blood analysis; when a refusal occurs, the new law makes it admissible. Since the Supreme Court in *Neville* upheld admitting evidence of refusals, § 316.1933(1) will do more harm than good. Implied Consent laws were passed to prevent the very violence section 316.1933(1)(a) may cause.²²¹ Considering there were incidents of police violence under the former Implied Consent Law²²² this section will only encourage more.

217. 3 Cal. App. 3d 890, 84 Cal. Rptr. 280 (1970).

218. 3 Cal. App. 3d ___, 84 Cal. Rptr. at 286.

219. 151 F. Supp. 378 (D.D.C. 1957).

220. See also *People v. Allen*, 86 Cal. App. 3d 948, 150 Cal. Rptr. 568 (1978) police officer's putting gun to defendant's neck and threatening to shoot unless suspected heroin balloons were not swallowed, violated due process since "the officers were aggressive beyond all need." *Id.* at ___, ___ P.2d ___, 150 Cal. Rptr. at 572.

221. "In general, legislatures have recognized that people under the influence of alcohol tend to be more abusive, and combative than they would be if sober. To require law enforcement officials to withdraw blood could easily lead to a pitched battle between police and the accused." Hauser, *supra* note 122, at 222.

222. See, e.g., *State v. Riggins*, 348 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1977), where police sat on a driver and twisted his broken arm to force submission. Unsuccessful, they threatened to jail him even though he was catheterized. Not surprisingly, at this point the driver gave the sample.

Hopefully section 316.1933(1)(a) will be seldom improperly utilized and soon repealed or declared unconstitutional.

B. Miranda Warnings and Drunk Driving

Another Privilege against Self-Incrimination question is whether arrested drivers must be given *Miranda* warnings. Under present Florida practices, arresting officers fill out an Alcohol Influence Report before chemical testing.²²³ The report contains not only the arresting officer's observation of the driver, but also specific questions drivers must be asked.²²⁴ The answers may affect the weight given chemical test results showing a driver's blood alcohol content. Since the statutory presumptions resulting from chemical influence are only "prima facie" evidence and not conclusive,²²⁵ a driver's trial testimony can explain why the results should be ignored.²²⁶ However, by providing the information police ask for, drivers may assist the state in building its case. *Miranda v. Arizona*²²⁷ held that whenever a person is in custody and under interrogation, certain warnings must be given prior to questioning to apprise the individual of his fifth amendment rights.²²⁸ Since by statute a driver must be "lawfully arrested" before being required to undergo chemical testing, *Miranda's* custody requirement is satisfied.²²⁹ Likewise the questions asked constitute "interrogation."²³⁰

223. Florida Highway Patrol Form No. 711.

224. For example, the driver is asked: "Have you been drinking?" and "Are you under the influence of an alcoholic beverage now?" *Id.*

225. FLA. STAT. § 316.1934(2)(c) (Supp. 1982).

226. See Fitzgerald & Hume, *supra* note 200, at 28-35 discussing factors affecting an individual's blood alcohol level.

227. 384 U.S. 436 (1966).

228. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

229. *Miranda* indicates custody exists "After a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. Courts have difficulty dealing with the second part of this definition. A narrow construction would allow more police questioning without warnings. In *State v. Roberti*, 644 P.2d 1104 (Or. 1982), a police officer admitted he intended to arrest before ques-

Only two Florida cases discuss whether drivers charged with traffic offenses should be given *Miranda* warnings. *County of Dade v. Callahan*²³¹ considered whether *Miranda* warnings should be given before field sobriety or breathalyzer tests are administered. Merely citing cases from other states finding *Miranda* warnings unnecessary in drunk driving cases, the court held that since the driver was charged with violating a city ordinance making drunk driving a petty offense, no warnings were needed. In *State v. Oliver*²³² an arrested driver refused to answer questions asked before a breath test was taken. The county court refused to suspend his license holding he was "under no obligation to answer questions or to perform physical tests. His sole duty is to blow into the breathalyzer machine."²³³ However, the Circuit Court reversed, based on *Callahan* and the additional rationale that since implied consent proceedings are civil administrative matters not criminal cases, the driver was not entitled to warnings.

The *Callahan-Oliver* reasoning is questionable at best. Neither case analyzed whether *Miranda* should apply to drunk driving arrests and were merely content to cite other cases holding it does not. The rationale that there is a distinction between criminal drunk driving proceedings and civil license suspensions has been heavily criticized by one

tioning a driver, but claimed this was not communicated. Examining whether this constituted custody, the court originally decided the definition's second part referred to "situations of greater deprivation of freedom of action than the ordinary stop of a car . . . , but short of formal arrest." *Id.* at 1109. Custody did not exist since the officer never mentioned his intentions. Justice Linde, dissenting, argued one of the majority opinion's dangers is potential misapplication in all drunk driving cases. "[I]t may be thought to stand for proposition that the crime of driving under the influence of intoxicants somehow is *sui generis* as far as *Miranda* warnings before questioning are concerned." *Id.* at 1125.

On rehearing, the court decided custody existed when the officer formed the intent to arrest. *Roberti*, 646 P.2d 1341 (1982), *petiton for cert. filed*, 51 U.S.L.W. 3208 (U.S. Sept. 28, 1982) (No. 82-315).

230. *Rhode Island v. Innis*, 446 U.S. 291 (1980), defined this as "not only . . . express questioning; but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301.

231. 259 So. 2d 504 (Fla. 3d Dist. Ct. App. 1971).

232. 47 Fla. Supp. 111 (Circuit Court, Palm Beach County, 1977).

233. *Id.* at 114 (Palm Beach County Court 1976).

recent federal court considering a “right to counsel” issue.²³⁴ Since these two cases summarily discuss *Miranda’s* application a brief look at other jurisdictions is needed.

State courts are split on this issue.²³⁵ Among courts finding warnings unnecessary New Jersey’s seem typical. *State v. Macuk*,²³⁶ cited by *Callahan*, found *Miranda* inapplicable to drunk driving arrest for four reasons, all debatable.²³⁷ *Macuk* noted *Miranda* and succeeding Supreme Court cases construing it all involve serious offenses. Thus until the Supreme Court acts otherwise, *Macuk* would limit its scope. This “petty offense” reasoning is wrong. There is no indication *Miranda* was intended to apply only to felonies. Indeed the opinion’s language indicates otherwise.²³⁸ Likewise subsequent decisions reject the petty offense argument for sixth amendment purposes. Where incarceration results the Supreme Court has held the “right to counsel” applies.²³⁹

Secondly, *Macuk* felt *Miranda* was limited to stationhouse questioning designed to “sweat out” a confession. This reasoning misreads *Miranda* in two respects. *Miranda* was concerned with such cases but

234. *Heles v. South Dakota*, 530 F. Supp. 646 (D.S.D. 1982), *vacated and remanded on other grounds*, 682 F.2d 201 (8th Cir. 1982). As *Heles* notes, a drunk driving arrest may result in criminal charges even though chemical testing is refused. The option is not the driver’s but the state’s. *See also infra*, text accompanying notes 248-57 for further criticism of this distinction.

235. *See State v. Fields*, 294 N.W.2d 404 (N.D. 1980); *State v. Lawson*, 285 N.C. 320, 204 S.E.2d 843 (N.C. 1974); *Commonwealth v. Bonser*, 258 A.2d 675 (Pa. 1969), holding *Miranda* applicable *Contra*, *City of Columbus v. Hayes*, 9 Ohio App. 2d 38, 222 N.E. 829 (1967), *cert. denied*, 389 U.S. 941 (1967); *State v. Bliss*, 238 A.2d 848 (Del. 1968); *State v. Neal*, 476 S.W.2d 547 (Mo. 1972).

236. 57 N.J. 1, 268 A.2d 1 (1970).

237. *See Comment, Miranda and Misdemeanors*, 14 LAND & WATER L. REV. 521 (1979) heavily criticizing *Macuk’s* rationale.

238. If the Court wished to draw a felony-misdemeanor distinction, it could easily have done so. The Court aimed at protecting a person’s fifth amendment privilege against self-incrimination, whenever the need arose: “[T]here can be no doubt that the fifth Amendment privilege is available *outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way.* . . .” 384 U.S. at 467 (emphasis added). This also refutes the *Callahan* criminal offense vs. civil administrative proceedings distinction.

239. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

not limited to them. The Court has indicated *Miranda* applies when custodial interrogation takes place outside a police station.²⁴⁰

Thirdly, the court in *Macuk* felt drunk driving offenses did not merit the extra time needed to inform drivers of their rights. This is a re-hash of the "petty offense" argument. The time consumed in reading a suspect the warnings is short, and many police departments have provided standard *Miranda* warnings cards to use.

Fourth, since New Jersey arrested many drivers yearly for drunken driving, to provide lawyers for all who might request them pursuant to *Miranda* would be too troublesome. This argument has been effectively eliminated in states adopting state-wide public defender systems, like Florida. The real reason for this argument is fear drivers would invoke the right to silence after being warned, thus making cessation of questioning mandatory.²⁴¹

Whether many drivers would invoke *Miranda* to remain silent and demand counsel after a drunk driving arrest is debatable.²⁴² At any rate, this argument misses the main issue. If *Miranda* warnings must be given, drivers are within their rights to remain silent notwithstanding any inconvenience this causes police.

Unfortunately the United States Supreme Court has declined all opportunities to decide this issue.²⁴³ More recent state cases have applied *Miranda* to the drunk driving situation.²⁴⁴ *State v. Fields*,²⁴⁵

240. See *Orozco v. Texas*, 394 U.S. 324 (1969) finding *Miranda* applicable to in-custody questioning in a defendant's bedroom.

241. See also *State v. Bliss*, 238 A.2d at 850 (citing large number of yearly drunk driving arrests as "practical reason why motor vehicle offenses should be treated somewhat differently . . . than most other offenses").

242. See Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967), concluding that for only eight of eighty-one suspects whose interrogations were observed did *Miranda* have any effect; Seeburger & Wettick, *Miranda in Pittsburgh - A Statistical Study*, 29 PITT. L. REV. 1 (1967) concluded *Miranda* had no appreciable effect on crime clearance rates.

243. In *State v. Lewin*, 163 N.J. Super. 439, 395 A.2d 211 (1978), cert. denied, 444 U.S. 905 (1979), Justices Brennan, White and Stewart noted the split among state courts and dissented from denial of certiorari.

244. Even states admitting refusals of testing have applied *Miranda* to drunk driving situations. See *Commonwealth v. Bonser*, 258 A.2d 675 (Pa. 1969); *Campbell v. Superior Court*, 479 P.2d 685 (Ariz. 1971).

245. 294 N.W.2d 404 (N.D. 1980). See also Note, *Criminal Law - Accusatory State of Proceedings - Custody Test Requires Miranda Warnings After DWI Arrest*,

found *Miranda* inapplicable to preliminary questions used to determine whether a person had been driving a wrecked vehicle. However, once the driver was arrested, *Miranda* protections were needed. *Fields* recognized a driver arrested for drunk driving is within custody and questioning him is interrogation. The court recognized a drunk driving arrest's implications and refused to consider it a mere traffic offense.

Florida clearly considers drunken driving a serious offense. Only a brief look at Florida Statutes Section 316.193²⁴⁶ is needed to demonstrate this. Moreover, considering drunken driving a minor violation forces police to unnecessarily distinguish instances where the offense is punishable by less than six months imprisonment and when it may result in manslaughter charges. The Florida Supreme Court has never considered whether *Miranda* applies to drunken driving offense arrests. When the time comes, it should follow the recent trend and apply *Miranda* in this context.

C. Right to Counsel and Chemical Intoxication Testing

In *Schmerber*, the Supreme Court held admitting results of a blood test, taken over the driver's objections based on incorrect advice of counsel,²⁴⁷ did not violate the sixth amendment right to counsel. Close reading shows the decision is not persuasive authority against a right to counsel claim. The driver was afforded the chance to contact his attorney. The right to counsel claim did not involve an access question but merely whether the attorney's advice was correct - a question the Court resolved in its fifth amendment discussion.

When *Schmerber* was tested, California had no Implied Consent law. Afterwards nearly every state passed one. Case law considering whether an arrested driver has a right to counsel unfortunately focuses on different standards. Most decisions discuss the difference between criminal proceedings under a state's drunk driving laws and civil license suspension proceedings under a state's implied consent law. Others consider whether the decision to submit to chemical testing is a "critical stage" requiring counsel. Additionally, a few states distinguish

57 N.D.L. REV. 673 (1981).

246. FLA. STAT. § 316.193 (Supp. 1982).

247. The attorney incorrectly advised *Schmerber* the blood sample was prohibited by the privilege against self-incrimination.

between a right to consult counsel versus the right to have counsel present when testing is done.

1. *Civil License Suspension versus Criminal Proceedings.*

If an arrested driver refuses testing, all states with implied consent laws provide administrative mechanisms for revocation or suspension of a driver's license.²⁴⁸ One recurring question is whether refusal based on a right to counsel claim constitutes refusal for revocation or suspension purposes. If a driver refuses, two possibilities arise: criminal prosecution and license suspension.²⁴⁹ Several states differentiate between the nature of these two proceeding as far as the right to counsel.²⁵⁰ Those states holding no right to counsel exists strictly construe the sixth amendment's language that: "In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel for his defense."²⁵¹

These states reason that since license suspensions are not "criminal prosecutions", no right to counsel is involved. Vermont illustrates the extremes to which such decisions go. In *State v. Dellveneri*²⁵² the Vermont Supreme Court, based upon the summary nature of the implied consent law's administrative suspension hearing, a civil proceeding, decided that a driver was not required to be informed of a right to counsel before deciding to take breathalyzer tests. However, when the proceedings became criminal the same court surprisingly found such a

248. See Florida Statutes section 316.1932(1)(d)(g) (Supp. 1982) for a description of Florida suspension procedures.

249. Indeed until testing is refused, only criminal prosecution is possible since there would be no basis for civil license suspension. When strong evidence exists, even absent test results, prosecution is a distinct possibility. See *Prideaux v. State Dept. of Public Safety*, 310 Minn. 176, ___, 247 N.W.2d 385, 389 (Minn. 1976).

250. See *Seders v. Powell*, 298 N.C. 453, 259 S.E.2d 544, 550 (1979) ("well established . . . that proceedings involving the suspension or revocation of a license . . . are civil, not criminal in nature"); *Agnew v. Hjelle*, 216 N.W.2d 291, 298 (N.D. 1974) ("proceedings under the Implied Consent Law are civil in nature"); *Gottschalk v. Sueppel*, 258 Iowa 1173, 1179, 140 N.W.2d 866, 869 (1966) ("Neither [federal or state constitution giving Right to Counsel] is applicable to this administrative proceeding. . . .").

251. U.S. CONST. amend. VI.

252. 128 Vt. 84, 258 A.2d 834 (1969).

right. *State v. Welch*²⁵³ held an accused's right to counsel was violated when police officers convinced a driver to submit to a breath test after he requested counsel. *Dellveneri* was discussed, but summarily distinguished based on the criminal nature of the proceedings in *Welch*.

This stretches the right to counsel issue to an extreme. Theoretically, under Vermont law, if the driver had continued to refuse testing and not been afforded a chance to consult counsel, the refusal could not have been admissible in a criminal trial since his sixth amendment rights were violated. However, if a civil license suspension proceeding was brought, the refusal could be admitted since the nature of those proceedings recognize no such right.

Fortunately several courts refuse to draw such illogical distinctions between the two proceedings.²⁵⁴ Such courts recognize the dual possibilities an arrest for drunk driving has and adopt a more realistic view. *Heles v. South Dakota*,²⁵⁵ the only federal court decision, recently declared

In effect the threat of a license revocation (the civil proceeding) is a tool employed at the time of arrest to gather evidence against the driver to utilize in a later criminal prosecution.*** To say that the person does not have a right to contact an attorney prior to deciding whether to take the sobriety test, because the license revocation proceeding, initiated once the test is refused, is civil in nature totally ignores the fact that the person is in custody pursuant to an arrest on a criminal charge. The proceedings are all criminal in nature until testing is actually refused.²⁵⁶

Heles correctly notes that drunk driving arrests have all the characteristics of any other criminal apprehension. The driver is formally placed under arrest, often given *Miranda* warnings, and most likely taken to jail for temporary detention. The only unusual aspect is the

253. 135 Vt. 312, 376 A.2d 351 (Vt. 1977).

254. See *Prideaux*, 310 Minn. 176, 247 N.W.2d 385; *Leopold v. Tofany*, 68 Misc. 2d 3, 325 N.Y.S.2d 24 (N.Y. Sup. Ct. 1971), *aff'd mem.*, 38 App. Div. 2d 550, 327 N.Y.S.2d 999 (1971).

255. 530 F. Supp. 646. (D.S.D. 1982).

256. *Id.* at 651-52 (footnotes omitted). Recently, the Eighth Circuit declared *Heles* moot, since the driver had died when the district court rendered its decision. The case was remanded with directions to vacate.

possibility of license suspension if refusal occurs. Especially significant are the *Miranda* warnings which include notification of a right to counsel during questioning. Given these, drivers may easily be misled into believing a right to counsel exists and should not be expected to draw a fine civil versus criminal distinction.²⁵⁷

2. Critical Stage Analysis

States refusing to use the fictitious civil-criminal distinction focus on the situation *when* an accused is asked to undergo testing - not the nature of any later proceeding. The right to counsel guaranteed in all criminal prosecutions has been extended well beyond the mere right to representation at trial. Any criminal proceeding whose nature makes it a "critical stage", is one where an accused is entitled to counsel.²⁵⁸ Courts have considered whether the decision to undergo chemical intoxication testing amounts to a critical stage under two bases: (1) whether the testing procedure itself amounts to a critical stage, (2) whether state court rule or statute makes testing a critical stage.

Most courts find that the nature of the testing process itself is not a "critical stage," where counsel is necessary. *United States v. Wade*²⁵⁹ considered whether any pre-trial proceeding is a "critical stage" by examining "whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."²⁶⁰

Wade considered a post-indictment lineup where the accused is confronted with possible eyewitnesses a critical stage since a lineup was inherently suggestive and seldom could be accurately reconstructed at trial. However *Wade* indicted that where a scientific process, like blood testing, is used to gather and evaluate evidence pre-trial, no such criti-

257. See also *State Dept. of Highways v. Beckey*, 192 N.W.2d 441, 192 N.W.2d 444 (Minn. 1971) (confusion generated by *Miranda* warnings is a reasonable ground to refuse test).

258. See *Coleman v. Alabama*, 399 U.S. 1 (1970), preliminary hearing where witnesses testify is a critical stage where counsel needed; *Hamilton v. Alabama*, 368 U.S. 52 (1961), arraignment where defenses must be asserted or lost requires counsel.

259. 388 U.S. 218 (1967).

260. *Id.* at 227.

cal stage exists.

"[K]nowledge of the techniques of science and technology is sufficiently available . . . , that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts."²⁶¹ Virtually all courts concluding chemical blood testing is not a "critical stage" rely on this language. The sole exception is *State v. Fitzsimmons*,²⁶² where the Washington Supreme court decided the right to counsel should apply to breathalyzer testing. *Fitzsimmons* termed drunk driving a unique charge. Since physical evidence would soon disappear, arrangements must be made for immediate supplemental testing and disinterested witnesses found. In this second respect, *Fitzsimmons* was misguided. Presenting disinterested witnesses is not peculiar to drunk driving but applies to any criminal charge. Some time will necessarily have passed before counsel can be contacted and arrive. Any witnesses will likely be gone. Counsel arguably will be able to use witnesses listed on an officer's accident report—something which can be obtained long afterwards.

Several states have decided that under their state laws or court rules, the right to counsel attaches to the decision whether to undergo testing. Some states explicitly guarantee such right,²⁶³ while others imply it from the decision an accused must make. Decisions finding no statutorily created right to counsel reason that since the arrested driver does not have a right under the Implied Consent law to refuse testing, counsel's advice is not required, even though the driver retains the

261. *Id.* at 227-28.

262. 93 Wash. 2d 436, 610 P.2d 893 (1980), *cert. granted, vacated and remanded*, 449 U.S. 977 (1980). The Court, remanded for consideration whether the judgment was based upon state or federal constitutional grounds or both. Justices Brennan, Stewart, Marshall and Stevens dissented. On remand, the Washington Supreme Court held its decision rested primarily on a state court rule, but declared its previous constitutional discussion "helps demonstrate the application and effect of the court rules". 620 P.2d 999, 1000 (Wash. 1980).

263. *See, e.g.*, N.C. GEN. STAT. § 20-16.2(a)(4) (Supp. 1981) which provides: "That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights."

power to refuse.²⁶⁴

Prideaux v. State Department of Public Safety,²⁶⁵ the leading case to the contrary, relied on a state statute guaranteeing arrested persons the right to consult counsel as soon practicable.²⁶⁶ The court examined the possible choices facing an arrested driver and penalties which may arise therefrom. Since Minnesota law gave drivers the power to choose between submitting or not, the driver's decision was considered important enough to afford counsel. Likewise *Heles v. South Dakota*²⁶⁷ focused partially on state law to find counsel should be afforded. "The fact that by statute, South Dakota allows the arrested driver to refuse to take the test, brings into play important legal considerations."²⁶⁸ Since state law created such a choice, it would be unfair to deny the advice of counsel in making the choice.²⁶⁹

3. Nature of the Right to Counsel

Once courts find a right to counsel exists when a person is requested to undergo blood content analysis, the extent of that right must be determined. Even if the right exists, only one court requires that an arrested driver be explicitly informed.²⁷⁰ Most decisions discuss what should happen when the driver requests counsel. In this regard the

264. See *Campbell v. Superior Court*, 479 P.2d 685, 693 (Ariz. 1971) ("person does not have a right to refuse . . . only the physical power; therefore . . . there is no issue of counsel's ability to assist"); See also *Dunn v. Petit*, 388 A.2d 809 (R.I. 1978).

265. 247 N.W. 2d 385.

266. See MIN. STAT. § 481.10 (1971).

267. 530 F. Supp. 646 (D.S.D. 1982).

268. *Id.* at 652.

269. See also *Fuller v. State Dept. of Transp.*, 275 N.W.2d 410 (Iowa 1979), state statutorily required to honor arrested driver's request to consult counsel before deciding to take chemical test; *Gooch v. Spradling*, 523 S.W.2d 861 (Mo. App. 1975), court rule requires person held in custody opportunity to consult counsel; *McNulty v. Curry*, 42 Ohio St. 2d 341, 328 N.E.2d 798 (1975), state statutes allows communication with attorney following arrest or detention; Comment, *The Right to Counsel Under Oregon's Implied Consent Law*, 10 WILLAMETTE L.J. 236 (1974) arguing that Oregon law requires the right to consult counsel before deciding to submit to chemical testing; Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935 (1980), arguing that even if counsel is not constitutionally required, states should legislatively provide for such.

270. *Prideaux*, 247 N.W.2d 385.

courts are almost uniform in finding a limited right. Only reasonable opportunity to consult counsel is needed, such as a phone call. Anything more would seem to jeopardize the opportunity to gather evidence, since alcohol metabolizes in the body rapidly.

*State v. Fitzsimmons*²⁷¹ is the only case requiring more. Most cases arise when a driver wishes to call an attorney. What happens when the driver claims indigency and requests counsel? *Fitzsimmons* requires that counsel be afforded under the circumstances. While this appears to present police officers with an unsurmountable obstacle, especially since many drunk driving arrests occur late at night, *Fitzsimmons* suggests that reasonable methods, such as having police carry lists of volunteer attorneys, could be utilized. *Fitzsimmons* rejected the state's argument that this would present problems because counsel would always want to be present at testing, since telephone consultations might often be sufficient. The suggestion is curious as the court had found the decision to submit to testing a critical stage where counsel is needed to find possible defense witnesses. No attempt was made to reconcile these apparent conflicts. Likewise, the court did not consider what happens when a telephone call alone would not suffice.

4. *Right to Counsel in Florida*

Florida courts have not acted favorably on right to counsel claims. In the earliest case, *State v. Wilson*,²⁷² an arrested driver claimed his sixth amendment rights were denied when police refused to delay breathalyzer testing until his attorney arrived. Wilson had been afforded the opportunity to consult counsel but still refused testing when his attorney had not arrived after an hour and fifteen minutes. Rather than deciding the issue on the narrow basis that Wilson had been afforded all that was constitutionally required—a reasonable opportunity to consult counsel rather than actually having an attorney present—the court focused on the civil nature of the proceedings under the Implied Consent Law, rather than a criminal prosecution. Thus *Wilson* followed those cases finding license suspensions not a “criminal prosecution” under the sixth amendment.

271. 610 P.2d 893.

272. 34 Fla. Supp. 141 (Circuit Court of Fifteenth Judicial Circuit 1970).

Subsequently, *State v. Oliver*,²⁷³ again raised the right to counsel question in connection with breath testing. There an arrested driver, given *Miranda* warnings and advised of the consequences for refusing the breathalyzer, requested an opportunity to contact counsel. Informed that an attorney's presence was not needed to administer the test, Oliver's repeated requests ended with the arresting officer certifying his refusal to submit. Relying on *Wilson*, the Circuit Court reversed a county court ruling that Oliver was entitled to consult counsel before taking the test. The court first decided that any proceedings resulting from refusal to cooperate with the police would be civil, under the Implied Consent Law, rather than criminal. Additionally, the court noted that *County of Dade v. Callahan*²⁷⁴ had declared this a petty offense not needing *Miranda* warnings and *State v. Webb*²⁷⁵ had held there was no right to counsel in petty offense cases summarily triable and punishable by less than six months imprisonment. Thus *Oliver* declared the right to counsel did not apply.

Unfortunately, no Florida Supreme Court or District Court of Appeal cases have addressed the right to counsel issue in the context of blood alcohol testing. Recent developments show *State v. Oliver* is erroneous law. First, *Oliver's* reasoning is clearly questionable. *Oliver* failed to distinguish between the different provisions the drivers were charged with violating. In *Callahan* the offense charged was violation of a municipal ordinance rather than a state-wide statute as in *Oliver*. Secondly, *State v. Webb* upon which *Oliver* heavily relied, is also questionable. *Webb* declared that offenders accused of petty traffic offenses are not entitled to a jury trial. *Webb* did not, as *Oliver* says, discuss the sixth amendment right to counsel in such proceedings. Indeed had *Webb* done so, the decision would be wrong.²⁷⁶ Why *Oliver* failed to

273. 47 Fla. Supp. 3 (Circuit Court, Palm Beach County, 1977).

274. 259 So. 2d 504 (Fla. 3rd Dist. Ct. App. 1971).

275. 335 So. 2d 826 (Fla. 1976).

276. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court rejected the petty offense-serious crime argument for right to counsel purposes twice, first noting "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone." *Id.* at 29. and secondly, forcefully declaring the distinction between the two. "While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases' there is no such support for a similar limitation on the right to assistance of counsel . . ." *Id.* at 30.

note this is unexplainable²⁷⁷ and shows its error. Thirdly, *Oliver* did not distinguish between the types of offenses before it and the *Webb* court. *Webb* did not deal with a drunk driving offense but with driving without a valid inspection sticker and with an expired driver's license. Finally, statutory changes raise further questions about the continued vitality of the *Webb-Callahan* cases. Today, defendants can have jury trials in any "drunk driving" case.²⁷⁸ This effectively does away with the *Oliver-Callahan* rationale that these can be summary proceedings. Moreover, *Oliver* never considered whether the same rationale would apply if the charge had been D.W.I. manslaughter—certainly not summarily triable and clearly not a petty offense.

At least two subsequent county court cases have not followed *Oliver*. In *State v. Roche*²⁷⁹ denial of a request to consult counsel before deciding to submit to a breath test caused reversal over the state's claim that this was a refusal. The Orange County Court agreed there is no sixth amendment right to counsel before deciding to take a breath test.²⁸⁰ Thus police were not required to inform a driver of such. However, when drivers request the chance to consult counsel, the court using a due process analysis found that a reasonable opportunity to do so was required. On appeal, merely stating its agreement with courts finding no limited right to consult counsel, the Circuit Court proceeded to do a brief *Wade* "critical stage" analysis.²⁸¹ However, the County Court never relied on this, but rather chose a due process approach. Misunderstanding and mixing the two grounds, the Circuit Court re-

277. *Oliver* is the only decision relying on a petty offense - felony distinction to find there is no right to consult counsel. Following *Argersinger*, *Scott v. Illinois*, 440 U.S. 367 (1979), held the right to counsel exists only wherever imprisonment is actually imposed. For a critical review of *Scott*, see Herman & Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine*, 17 AM. CRIM. L. REV. 71 (1979).

278. See FLA. STAT. § 316.1934(5). *Caverly v. State*, 8 Fla. L.W. 1364 (Fla. 2d Dist. Ct. App. May 13, 1983) reversed a driving under the influence conviction where a jury trial request was denied.

279. (No. T080-53470; Orange County; Dec. 19, 1980).

280. The court accepted *Wilson's* civil administrative proceeding vs. criminal prosecution analysis. Thus *Roche* never undertook the next level of sixth amendment analysis, whether a chemical test for intoxication amounted to a "critical stage" under *Wade*.

281. (Orange County Circuit Court; AP81-11; Dec. 23, 1981).

versed the lower court's decision.

State v. Formato,²⁸² without discussing *Oliver*, found that by passing Florida Statutes section 901.24²⁸³ which states: "A person arrested shall be allowed to consult with any attorney entitled to practice in this state, alone and in private at the place of custody as often and for such periods of time as is reasonable"²⁸⁴ the legislature made arrest a critical stage where the opportunity to consult counsel is required. Thus BAT Mobile videotapes taken after a refusal to let the driver call an attorney were inadmissible. If *Formato's* analysis based upon Florida Statutes section 901.24 is correct, Florida has joined states creating a statutory right to consult counsel before submitting to breath testing. Unfortunately, the case law on this point seems split as *Oliver* earlier had reversed, without discussion, the County Court's partial reliance on section 901.24 to find a right to counsel. Likewise, the Circuit Court in *Roche* rejected a section 901.24 claim. Doing so, it examined section 901.24 in conjunction with the valid excuses for refusal of testing under the Implied Consent Law. Since the law did not specifically mention whether a driver was afforded the right to counsel as an issue in a suspension hearing, the Circuit Court reasoned that the legislature by passing section 901.24 did not intend to amend the Implied Consent Law.²⁸⁵

Even without section 90.124 a right to counsel argument can still be made. As noted above, under the Implied Consent Law, Florida drivers retain the power to refuse breath testing. When testing has been previously done over such refusal, the courts consistently declared the

282. (Broward County Court; No. 80-37621TT40; June 10, 1981).

283. FLA. STAT. § 901.24 (1981).

284. *Id.*

285. *Roche* was decided under the former Implied Consent Law. The law's new version likewise does not indicate legislative intent to make section 901.24 valid grounds for refusing testing.

In *State v. Burts*, 24 Fla. Supp. 88 (Dade County Circuit Court 1964), counsel appeared and advised police he would not permit any chemical testing. When this was done anyways, the Circuit Court suppressed results. *Burts* is irrelevant to a section 901.24 right to counsel argument. At the time Florida had no Implied Consent Law giving drivers the option of testing or suspension upon refusal. *Schmerber v. California* subsequently established the driver had no fifth amendment right to refuse testing. Thus the results taken over the refusal should have been admitted since neither constitutional grounds nor state law prohibited such.

results inadmissible. While Florida Statutes section 316.1933²⁸⁶ modifies former case law in limited circumstances with respect to blood testing, most forced testing is still invalid. Given this recognized power to refuse testing, a *Heles - Prideaux* rationale could be adopted to find that a right to counsel exists. Besides obtaining witnesses' names, counsel could play an important role in advising a driver whether to submit. If death or serious bodily injury has occurred, convictions may be difficult to obtain without chemical test results. In such instances, counsel will often advise refusal. Alternatively, if counsel advises submission, the driver may request additional testing to ensure the accuracy of test results²⁸⁷ or additional breath or blood samples.²⁸⁸ Whatever the ultimate result, one thing is clear. Most decisions finding no right to consult counsel have relied on wrong analysis. Thus the right to counsel issue is still unsettled in Florida.

V. CONCLUSION

The new "drunk driving" law makes substantial changes in prior Florida statutes and case law. Like any new law, only experience can establish how effective the changes are. Given the media attention, it should have at least beneficial short term results.²⁸⁹ However, as pointed out,

286. FLA. STAT. § 316.1933 (Supp. 1982).

287. If optional testing is not afforded, suppression of other test results occurs. *City of Jasper v. Cromer*, 32 Fla. Supp. 107 (Hamilton County Circuit Court 1969) reversed a defendant's conviction where police refused a driver's reasonable request for optional testing. The Implied Consent law does not require police to inform drivers of any right to additional testing. Additional testing may be necessary to ensure the proper interpretation of the first test's results. See Fitzgerald & Hume, *supra* note 200, disputing the validity of convictions when only one test is administered.

288. Florida law does not require police to obtain or preserve breath or blood samples for later defense testing. See *State v. Cooper*, 391 So. 2d 332 (Fla. 3d Dist. Ct. App. 1980), no due process violation when blood sample lost since evidence concededly favorable to defense; *State v. Phillipe*, 402 So. 2d 33 (Fla. 2d Dist. Ct. App. 1981), failure to preserve test ampoules is a matter for Department of Highway Safety and Motor Vehicles rather than courts. *State v. Lee*, 422 So. 2d 76 (Fla. 2d Dist. Ct. App. 1982) (no due process violation in state's failure to retain sample of driver's breath). See also Thornton, *Uses and Abuses of Forensic Science*, 69 A.B.A.J. 289, 292 (March 1983), for criticism from a forensic scientist's viewpoint of those jurisdiction requiring retention of Breathalyzer test ampoules for independent testing.

289. After six months' operation under the new law, traffic fatalities were down

serious deficiencies remain. The following changes should be made during the next legislative session:

- (1) Repeal § 316.1933 allowing forcible blood sampling, or at least restrict such when it would be medically dangerous;
- (2) Provide specific authorization for the Department of Health and Rehabilitative Services, or another appropriate state agency, to adopt statewide testing procedures for urinalysis;
- (3) Amend § 316.1932(1)(c) to require police officers to notify drivers that refusal of a test will result in admission of the refusal in any trial, along with license suspension;
- (4) Amend § 316.1932(1)(h) to require law enforcement personnel to notify drivers of the right to optional testing;
- (5) Amend the law to require law enforcement personnel to obtain additional samples of blood, breath or urine for later testing within a reasonable time, e.g., thirty days, by defendant drivers.

Given passage of any, and hopefully all, of these recommendations,²⁹⁰ Florida's drunk driving law will be a more effective and fairer

12% compared to 1981. *See New law cited as fatalities decrease*, Fort Lauderdale News, Jan. 1, 1983, at 1B, col. 5.

290. During the 1983 legislative session, there were thirteen bills introduced to amend the "drunk driving" laws. Only one bill, H.B. 809, 1983 Fla. Laws ch. 83-187, which amends Fla Stat. §§ 316.193(1) (Supp. 1982) and 316.1931(1) (Supp. 1982) by replacing the words "model glue" with "chemical substances set forth in 877.11," passed. This broadens the category of chemicals, other than alcohol or controlled substances, it would be illegal to drive under the influence of. *See supra* text accompanying n. 10-14 for description of how these sections presently read.

A brief description of the twelve bills not passing follows below:

(1) S.B. 69 would have given under Fla. Stat. § 316.1931 (Supp. 1982) the Department of Highway Safety and Motor Vehicles authority to revoke the license of any driver involved in an accident causing property damage or personal injury while driving under the influence even if the trial court withheld adjudication. The revocation period runs from the date of offense rather than the date adjudication is withheld, thus still making it possible for court delays to shorten the intended revocation time.

(2) H.B. 36 would have amended Fla. Stat. § 316.1931 (Supp. 1982) to provide a minimum one year sentence for drivers convicted of manslaughter. This sentence could not be withheld nor could a driver be paroled before serving the minimum one year's time.

(3) H.B. 1202 would have amended Fla. Stat. § 316.193(4) (Supp. 1982) to require first offenders to be placed on probation for up to one year.

(4) S.B. 962 would have amended Fla. Stat. § 316.193 (Supp. 1982) to require

means of eliminating drunk drivers from the roadways.

any driver convicted of driving under the influence or with unlawful blood alcohol level to pay an additional \$10.00 fine into the prosecuting county's fine and forfeiture fund.

(5) S.B. 179 would have amended Fla. Stat. § 316.193(4)(a) (Supp. 1982) to require a minimum seven days incarceration for convicted drivers who refuse to do the "public service or community work project" required of first offenders.

(6) H.B. 942 would have amended Fla. Stat. § 316.193(4)(a) (Supp. 1982) to forbid remuneration for any required public service. However the bill also would create Fla. Stat. § 316.1936 making any person doing mandatory "public service" a state employee for Workmen's Compensation purposes.

(7) H.B. 474 required a Victim Impact Statement for sentencing use, whenever death or serious bodily injury occurs to someone else because of an offender's driving under the influence.

(8) H.B. 551 would have repealed the statutory right to jury trial under Fla. Stat. § 316.1934(4) (Supp. 1982).

(9) S.B. 246 would have increased the license suspension period for refusing a blood alcohol test from three to six months for a first refusal and from six months to one year for subsequent refusals.

(10) S.B. 224 would have required alcohol abuse education for anyone convicted of being a "disorderly or dangerous alcohol offender" under a newly created Fla. Stat. § 856.012.

(11) H.B. 550 would have provided additional sentencing alternatives for minors convicted of driving intoxicated or under the influence.

(12) S.B. 852 would have created new provisions suspending for specified time periods the registration of any vehicle whose owner drives during a license suspension due to drunk driving violations.

I.R.C. Section 2518 and the Law of Disclaimers An Update

by Don J. Jaret

The Tax Reform Act of 1976¹ introduced Code section 2518,² which attempted to create definite standards for a disclaimer to be valid for federal tax purposes. In 1978, Congress amended section 2518 to liberalize one of the many requirements which must be satisfied for a disclaimer to be qualified,³ and in 1981, Congress again amended section 2518 to remove the requirement that the disclaimer be valid under state law.⁴ This article will endeavor to discuss the post-1978 evolution of section 2518 beginning with a critical analysis of the Internal Revenue Service's ("IRS") interpretation of that Section as incorporated in the proposed regulations promulgated under section 2518. In addition, the most significant of the numerous private letter rulings issued by the IRS interpreting section 2518 will be discussed including a review of the effect of the 1981 amendment. In conclusion, suggestions for clarifying aspects of the law of disclaimers will be put forth with the hope that the stated purpose of the law will be achieved.⁵

I. Disclaimers as an Estate Planning Tool

A disclaimer is the refusal to accept the ownership of property or

1. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2518, 90 Stat. 1893 (1976), added I.R.C. § 2518.

2. I.R.C. § 2518 (1976) (hereinafter referred to as § 2518).

3. Tax Reform Act of 1978, Pub. L. No. 95-600, § 702(M)(1), 92 Stat. 2935 (1978), added I.R.C. § 2518(b)(4).

4. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 426, 95 Stat. 172 (1981), added I.R.C. § 2518(c)(3) [hereinafter cited as ERTA 1981].

5. For an analysis of the law prior to the enactment of section 2518 and an analysis of the effectiveness of section 2518, see Frimmer, *Using Disclaimers in Post Mortem Estate Planning: 1976 Law Leaves Unresolved Issues*, 48 J. TAX'N 322 (1978); Note, *I.R.C. Section 2518 and the Law of Disclaimers*, 4 NOVA L.J. 187 (1980).

rights with respect to property.⁶ The major importance of disclaimers is the flexibility they provide for estate planning. Disclaimers can be used to correct errors in an estate plan after it would ordinarily be too late (for example, after the testator's death), adjust the estate plan to account for changed circumstances, avoid the creditors of a beneficiary and allow post mortem estate planning. The following example will demonstrate the use of disclaimers as a method of achieving tax savings; assume each of the following disclaimers are qualified.

A disclaimer may be used to save gift tax.⁷ X devises Whiteacre to B. B has no need for Whiteacre and would prefer it to pass to his son C. If B accepts Whiteacre and transfers it to C for less than adequate and full consideration, B has made a taxable gift to C.⁸ However, if B disclaims Whiteacre it passes to C and no gift tax will be imposed on B.⁹ There is no gift from B to C because B will be treated as never having owned Whiteacre.¹⁰

A disclaimer may be used to save estate tax.¹¹ X devises Whiteacre to B who is terminally ill. B would prefer to give Whiteacre to his son C in a manner that will not have any tax ramifications. If B accepts Whiteacre and then dies, Whiteacre will be included in B's gross estate.¹² If B disclaims Whiteacre, it will pass to C and there will be no

6. WAYS AND MEANS COMM. REPORT ACCOMPANYING H.R. 14844, H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 65 (1976) [hereinafter cited as WAYS AND MEANS COMM. REPORT].

7. I.R.C. § 2518(a) (1976); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65.

8. I.R.C. §§ 2501, 2511 (1954); Treas. Reg. § 25.2511-1(c) (1972), T.D. 6334, 1958-2 C.B. 643. See *Hardenbergh v. Comm'r*, 198 F.2d 63 (8th Cir.), *aff'd*, 17 T.C. 338 F. Supp. 1336 (N.D. Miss. 1970), *aff'd per curiam*, 26 AFTR 2d 1653 (5th Cir. 1972); *Krakoff v. United States*, 313 F. Supp. 1089 (S.D. Ohio *aff'd*, 439 F.2d 1023 (6th Cir. 1971); *William L. Maxwell v. Comm'r*, 17 T.C. 1589 (1952).

9. I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65.

10. "(a) General Rule-For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred by such person." I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65.

11. I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65. For purposes of estate tax, I.R.C. § 2046 (1976) says 2518 applies.

12. "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death." I.R.C. § 2033 (1954); Treas. Reg. § 20.2033-1 (1963).

inclusion in B's gross estate because B will again be treated as never having owned Whiteacre.¹³

A disclaimer may be used to prevent an overfunding or an underfunding of a marital bequest for purposes of achieving the optimal marital deduction.¹⁴ If an amount greater than the optimal marital deduction¹⁵ passes to the surviving spouse, the excess will be taxed in the estate of the surviving spouse.¹⁶ If the surviving spouse disclaims the excess¹⁷ over the optimal marital deduction, the disclaimed property will not be included in the surviving spouse's gross estate.¹⁸ If an amount less than the optimal marital deduction is provided for the surviving spouse, a disclaimer by another can increase the property passing to the spouse and allow use of the full marital deduction.¹⁹ In much the same way, a disclaimer by one heir can be used to increase an estate's charitable deduction.²⁰ Thus, a disclaimer can be an important post mortem estate planning tool.

A disclaimer will prevent the imposition of a generation skipping

13. *Brown v. Rautzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933); I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65.

14. I.R.C. §§ 2518(a), 2056 (1954) (amended by 1981 ERTA); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65. In the following discussion it is assumed that achieving the optimal marital deduction is desired. The optimal marital deduction is not necessarily the maximum deduction allowable, for example, where a decedent's adjusted gross estate is less than \$425,000. For the law prior to § 2518 see generally I.R.C. § 2056(d) (1954) (amended by 1981 ERTA) and Treas. Reg. § 20.2056(d)-1 (1958).

15. ERTA 1981 amended § 2056 to provide for an unlimited marital deduction.

16. It will be included in the estate of the surviving spouse as an I.R.C. § 2033 inclusion because the spouse owned the property at death. If the marital bequest were limited to the optimal amount, the excess would escape estate tax entirely.

17. The issue of partial disclaimers will be discussed later in this article as part of an analysis of the Tax Reform Act of 1976. See text accompanying notes 58-104.

18. I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65. This possibility of a surviving spouse disclaiming an interest in a marital trust and taking a portion of the disclaimed interest under a non-marital trust will be discussed later in this article. For purposes of this example assume the property passes to the issue of the surviving spouse.

19. I.R.C. § 2518(a).

20. *Id.* For an excellent discussion and example of disclaimers with respect to charitable deductions, see Newman & Kalter, *The Need For Disclaimer Legislation—An Analysis of The Background and Current Law*, 28 TAX. L. 571, 577 (1975).

tax.²¹ X devises to his son B a life estate in Whiteacre with remainder to B's son C. Assuming that the value of the property at B's death is greater than \$250,000, a generation skipping tax will be imposed at that time.²² If B disclaims his life estate, no generation skipping tax will be imposed because B will be treated as never having owned a life estate in Whiteacre.²³

A disclaimer may shift the income tax consequences of a trust.²⁴ X devises to B, a wealthy individual with a large income, the power to designate who shall be the recipient of an income interest in the trust *res*. The power excludes designation of the grantor's spouse.²⁵ If B disclaims his power he will not be taxed on the income.²⁶ Assuming B disclaims and the income is payable to B's son C, an individual with very little income, income tax will be saved as a result of the graduated tax rates.

II. Legislative History

The confusion and uncertainty surrounding the common law of disclaimers has generated considerable discussion of ways to clarify the law.²⁷ Many commentators and Congress suggested that the law of disclaimers be federalized and specific disclaimer requirements be imposed.²⁸ The widespread dissatisfaction with the pre-1977 state of the

21. I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65. See § 2614(c) (1976); S. REP. NO. 94-1236, 94th Cong., 2d Sess. 607 (1976).

22. See generally I.R.C. §§ 2601-2614.

23. I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 35. I.R.C. § 2614(c) refers to § 2518 for the effect of a qualified disclaimer.

24. I.R.C. § 2518(a); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 65.

25. I.R.C. § 678(a)(1) (1954); Treas. Reg. § 1.678(a)-1 (1956).

26. I.R.C. § 2518(c)(2) (1976) treats a power with respect to property as an interest in such property. I.R.C. § 2518(a) will treat B as never having the power if he disclaims it. In *Gallagher v. Smith*, 223 F.2d 218 (10th Cir. 1954), *rev'g* 119 F. Supp. 360 (D.C. Pa. 1953) a widow disclaimed a portion of her interest in a trust. The court held she was only taxable on the income of the portion she retained.

27. Newman & Kalter, *Disclaimers of Future Interests*, 49 NOTRE DAME LAW. 827, 837 (1974); Committee on Estate and Gift Taxes, *Tax Section Recommendations No. 1974-2*, 27 TAX LAW. 818 (1974).

28. Newman & Kalter, *Disclaimers of Future Interests*, 49 NOTRE DAME LAW. 827, 837 (1974); Committee on Estate and Gift Taxes, *Tax Section Recommendations No. 1974-2*, 27 TAX LAW. 818 (1974); WAYS AND MEANS COMM. REPORT, *supra* note

law brought about the enactment of section 2518.²⁹ A disclaimer of an interest in property created after 1976 will be effective for federal tax purposes only if it is a "qualified" disclaimer. Section 2518 delineates the requirements a disclaimer must satisfy to be considered qualified. Section 2518, as initially adopted, required that the disclaimed property must pass to a person other than the disclaimant and that the disclaimer be valid under local law.

In 1978, Congress recognized that the requirement that the disclaimed property pass to someone other than the disclaimant would create an undesirable situation where the disclaimant was a surviving spouse and the property passed to a non-marital or marital trust as a result of the disclaimer. Congress therefore amended section 2518 to make it possible for property to pass to a decedent's spouse as a result of a disclaimer even if the surviving spouse was the disclaimant.³⁰

In 1981, Congress, recognizing the local law still played an important role in determining whether a disclaimer was qualified, amended section 2518 in an attempt to make it independent of state law. Congress felt that state law was not an adequate basis upon which to measure the effectiveness of a disclaimer because local disclaimer laws were not uniform. This caused identical refusals to accept property to be treated differently for Federal estate and gift tax purposes.³¹

III. Proposed Regulations and Private Rulings

The IRS published proposed regulations for section 2518 on July

6, at 66.

29. Newman & Kalter, *Disclaimers of Future Interests*, 49 NOTRE DAME LAW. 827, 837 (1974); Committee on Estate and Gift Taxes, *Tax Section Recommendations No. 1974-2*, 27 TAX LAW. 818 (1974); (1974). The dissatisfaction stemmed from the fact that prior to § 2518, disclaimers were handled under many different code sections and in many different regulations and were dependent upon local law. See Treas. Regs. §§ 25.2511-1(c) (1972), 20.2041-3(d)(6) (1958), 20.2056(d)-1(a)(1958).

30. Tax Reform Act of 1978, Pub. L. No. 95-600, § 702(M), 92 Stat. 2934 (1978), amended I.R.C. § 2518(b)(4) [hereinafter referred to as Tax Reform Act of 1978]; STAFF OF THE JOINT COMM. ON TAXATION, 96th Cong., 1st Sess., LEGISLATIVE HISTORY OF THE TAX REFORM ACT OF 1978 at 443 (Comm. Print 1979); WAYS AND MEANS COMM. REPORT, *supra* note 6.

31. WAYS AND MEANS COMM. REPORT, ACCOMPANYING H.R. 4242, H.R. REP. NO. 97-201, 97th Cong., 1st Sess. 190 (1981).

22, 1980.³² At this time, the date final regulations will be issued and the form those regulations will take is entirely speculative.³³ In addition to the proposed regulations, the IRS has attempted to interpret the law as it relates to specific taxpayer questions by issuing numerous private letter rulings.³⁴ This portion of the article will analyze several important provisions of the proposed regulations and several significant private letter rulings with respect to section 2518.

A. Reliance Upon State Law

The intent of Congress in enacting section 2518 was to create a federal standard for disclaimers, thus ending reliance upon state law in determining the federal tax consequences of a disclaimer.³⁵ Therefore, most practitioners hoped that section 2518 would provide a uniform set of rules for determining the federal tax consequences of a disclaimer. However, prior to the amendment of section 2518 contained in the Economic Recovery Tax Act of 1981,³⁶ section 2518(b)(4)(A) and (B) required that the disclaimed interest must pass to a person other than the disclaimant or the spouse of the decedent (the decedent being the testamentary transferor). The pre-1982 absence of a federal rule or regulation determining who will receive the disclaimed property³⁷ prevented section 2518 from acting as a safe harbor because the courts were forced to look to local law in making the determination as to whether a disclaimer was disqualified. Consequently, if local law did not recognize the disclaimer, section 2518(b)(4) could not be satisfied. Therefore,

32. Prop. Reg. §§ 25.2518-1 to 4, 45 Fed. Reg. 48,922 (1980)(to be codified at 26 C.F.R. § 25.2518).

33. On November 23, 1981, a final version of the regulations were delivered to the Commissioner for final approval.

34. Rev. Proc. 80-20, 1980-1 C.B. 633.

35. "If the requirements of the provision are satisfied, a refusal to accept property is to be given applicable effect for federal, estate and gift tax purposes even if the local law does not technically characterize the refusal as a 'disclaimer'. . . ." WAYS AND MEANS COMM. REPORT, *supra* note 6, at 67. See also, Frimmer, *supra* note 5.

36. ERTA 1981 426(a). Section 2518(c)(3)(1981) applies to transfers creating an interest in the person disclaiming made after December 31, 1981.

37. There are no federal rules or regulations which deal with who the recipient of the property will be after the property has been disclaimed. Therefore, local law must be consulted.

prior to 1982, the only way to be certain a disclaimer would be qualified is to satisfy both state and federal requirements.

The proposed regulations specifically provide that a disclaimer, to be qualified, must be valid under state law.³⁸ Moreover, in a number of private letter rulings, the IRS has ruled that a disclaimer not valid under state law cannot be a qualified disclaimer under section 2518.³⁹

Recognizing that the purpose and intent of section 2518—to create a uniform federal standard for disclaimers—was being thwarted by the IRS, Congress, as part of the Economic Recovery Tax Act of 1981, added a new section 2518(c)(3) to the Code.⁴⁰ Section 2518(c)(3) provides that:

(3) Certain Transfers Treated as Disclaimers. For purposes of Subsection (a), a written transfer of the transferor's entire interest in the property—

(A) which meets requirements *similar to* the requirements of paragraphs (2) and (3) of Subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (with in the meaning of Subsection (b)), shall be treated as a qualified disclaimer.⁴¹

Thus, notwithstanding the fact that a disclaimer is not valid under local law, the recipient of property could, if the requirements of section 2518(c)(3) are satisfied, transfer property to another free of transfer tax.

The application of section 2518(c)(3) in many situations is unclear. Section 2518(c)(3) makes no attempt to define requirements which are "similar to" those contained in sections 2518(b)(2) and (3).

38. Prop. Reg. § 25.2518-1(c)(1), 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518). The regulation provides: "If a disclaimer is not effective under applicable local law to divest ownership of the disclaimed property in the disclaimant and to vest it in another, the disclaimer is not a qualified disclaimer under Section 2518."

39. See I.R.S. Letter Rulings, 8148018, July 31, 1981 (involving a pre-ERTA disclaimer), 8027016, March 27, 1980; 8022021, Feb. 26, 1980; and 7937011, May 31, 1979.

40. ERTA 1981 § 426(a) (which added § 2518(c)(3)).

41. I.R.C. § 2518 (c)(3) (1981) (emphasis added).

Consequently, a disclaimant will have no reliable method of determining whether he has complied with the requirements of subsection (c)(3). For example, is a disclaimer ten months after the date on which the interest was created qualified because a ten-month requirement is "similar to" the nine-month requirement? Is a disclaimer which occurs one day after a disclaimant has accepted the benefits of property qualified because the short period for which the benefits were accepted is "similar to" the requirement that none of the benefits be accepted? Conversely, is the "similar to" requirement to be interpreted more stringently than the normal requirements of section 2518(b)?

Another significant defect in section 2518(c)(3) is the requirement for a written transfer of the "entire interest" in property.⁴² Although unclear, that requirement seems to prohibit the disclaimer of an undivided portion of an interest. This can be illustrated by the following example. X dies intestate with Blackacre, his only asset, passing to B. State law prohibits the disclaimer of an intestate share. B disclaims an undivided $\frac{1}{2}$ interest in Blackacre. If state law recognized the disclaimer of an intestate share, B's disclaimer would be qualified insofar as it would be the disclaimer of an undivided portion of an interest.⁴³ It appears doubtful that Congress intended to limit the interest which may be disclaimed to the "entire interest" in property in those situations where the disclaimer is not valid under state law. Therefore, section 2518(c)(3) should be interpreted in such a manner as to allow the disclaimer of an undivided portion of an interest in property.⁴⁴

42. *Id.*

43. See Prop. Reg. § 25.2518-3(b) and the text accompanying notes 54-58 *infra*.

44. Due to the recent passage of § 2518 (c)(3), there is no indication at this time as to how the IRS will interpret the "entire interest" requirement.

The legislative history of § 2518(c)(3) provides:

Under the Committee Bill, for purposes of the estate and gift tax, a refusal to accept any property interest that is not effective to pass title under local law will be considered to pass the property without any direction on the part of the disclaimant if the refusal otherwise satisfies the Federal requirements and the disclaimant timely transfers the property interest to the person who would have received the property had the refusal been an effective disclaimer under state law. Although the State disclaimer rules will be used to determine the transferee, the refusal need not be a valid disclaimer under local law.

S. REP. NO. 97-144, 97th Cong., 1st Sess. 142 (1981).

The person to whom the transfer must be made is the person who would have received the property had the transferor made a qualified disclaimer.⁴⁵ Presumably, that language was intended to require a transfer by the disclaimant to the person to whom the property would have passed had the disclaimer been valid under state law.⁴⁶

B. Writing Requirement

One of the more basic and straightforward requirements of section 2518 is that the disclaimer be in writing.⁴⁷ Section 2518, however, does not specify whether the written disclaimer must be signed, or, if signature is required, who must sign. The proposed regulations specifically provide that the disclaimer must be signed, a requirement not expressly included in section 2518, and recognize that the legal representative of the disclaimant may sign.⁴⁸ Thus, it appears that one of the questions not resolved by the passage of section 2518—whether a legal representative may disclaim on behalf of an individual who is incapable of disclaiming due to a legal incapacity of one form or another—is answered affirmatively by the proposed regulations.

The IRS has ruled that the personal representative of a deceased beneficiary may disclaim property passing to a deceased beneficiary's estate.⁴⁹ the ruling did not indicate whether the result would have been different if the disclaimer had been made by a guardian or other form of legal representative. Presumably the precise title attached to the fiduciary will be considered irrelevant. The ruling did, however, emphasize the fact that the personal representative has the power to disclaim on behalf of the estate of the deceased beneficiary under state law.

The result where a legal representative does not have the power to disclaim on behalf of a deceased beneficiary under state law is less clear.⁵⁰ Presumably, the 1981 amendment adding section 2518(c)(3)

45. I.R.C. § 2518 (c)(3)(B).

46. *Id.*

47. I.R.C. § 2518(b)(1) (1976).

48. Prop. Reg. § 25.2518-2(b), 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518).

49. I.R.S. Letter Ruling 8146045, Aug. 19, 1981.

50. See Letter Ruling 8148018, July 31, 1981. In that ruling, the IRS held that the disclaimer by an executor was not qualified because state law did not authorize the

will allow a legal representative to disclaim on behalf of the person he represents regardless of the validity of the disclaimer under state law.⁵¹

C. Jointly Owned Property

The law of disclaimers as it applies to jointly held property, including tenancy by the entirety, has always been unclear. In a factual situation arising prior to the enactment of section 2518, the IRS ruled that jointly held property could not be disclaimed if the rights of each joint tenant vested upon the creation of the tenancy and no greater right accrues by the death of either.⁵²

The IRS appears to have changed its position with respect to the disclaimer of jointly held property. The proposed regulations sanction the disclaimer of jointly owned property if, in addition to the requirements contained in section 2518(b), the following requirements are met: (i) the disclaimer must be made with respect to the *entire interest* in property which is the subject of the tenancy, and (ii) the disclaimer must be made within nine months of the creation of the tenancy.⁵³

The requirement that the disclaimer must be made with respect to the "entire interest" in property seems to prohibit the disclaimer of the accretive interest created by the death of a joint tenant. For example, where A and B own real property as joint tenants with the right of survivorship and A dies within 9 months of the creation of the tenancy, if B must disclaim his entire interest in the real property for his disclaimer to be qualified, B must not have an interest in the property after the disclaimer. It is not clear whether B will be able to disclaim his *entire interest* in the property which he holds immediately after A's death because the IRS may take the position that B has already accepted the benefits of owning an undivided interest in that property, i.e. B has accepted the benefits of being a joint tenant prior to the death of A upon the creation of the tenancy. A more logical interpretation of this requirement would be to treat B as never having accepted the benefits

executor to disclaim on behalf of the decedent's estate.

51. See the discussion regarding the application of state law in text accompanying notes 35-46.

52. I.R.S. Letter Ruling 7911005, Nov. 29, 1978.

53. Prop. Reg. § 25.2518-2(d)(3), 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518).

of Blackacre. The Regulations should specifically provide that one's status as a joint owner of property will not be sufficient to constitute the acceptance of the benefits of ownership. Another consequence of the "entire interest" requirement is that it can be interpreted to prohibit the disclaimer of an undivided portion of the accretive interest created upon the death of a joint tenant.

The requirement that the disclaimer be made within nine months of the creation of the tenancy effectively prohibits the disclaimer of jointly held property in almost all situations. This can be illustrated by the following example. On January 1, 1982, A and B acquire a parcel of real property as joint tenants with the right of survivorship. On January 1, 1983, A dies. B, wishing to disclaim the accretive interest in the real property passing to him as a result of A's death, files a disclaimer with the executor of A's estate on January 2, 1983. B's disclaimer is *not* qualified insofar as it was not made within nine months of the creation of the tenancy (because the tenancy was created on January 1, 1982).

The "entire interest" and "nine month" requirements for a disclaimer of jointly held property to be qualified are an unwarranted extension of the statute. The rules of section 2518(b) should apply to jointly held property just as they apply to all other forms of property. The disclaimer of the accretive interest in property should be considered qualified, and a joint tenant should not be considered as accepting the benefits of jointly owned property by virtue of being a joint tenant.

Since the creation of a revocable joint bank account is not a taxable transfer,⁵⁴ the special rules for the disclaimer of jointly held property discussed above do not apply to revocable joint bank accounts.⁵⁵ Moreover, the nine month disclaimer period does not begin to run until the death of the donor.⁵⁶

One interesting question with respect to revocable joint bank accounts is whether the donor or transferor of the property can make a qualified disclaimer of his survivorship interest in the property on the death of the co-tenant. For example, if H using his individual funds creates a joint bank account with his wife, W, will H's disclaimer of

54. I.R.C. § 2511 (1954); Treas. Reg. § 25.2511-2(c) (1972).

55. Prop. Reg. § 25.2518-2(d)(3).

56. I.R.S. Letter Rulings 8130069, April 29, 1981; 8124118, March 20, 1981.

the bank account upon the death of W be qualified? The IRS has ruled that it would not because "the estate and gift tax laws apply to the disclaimed interest . . . as if the interest had never been transferred to such person."⁵⁷ Thus, the IRS reasoned that the qualified disclaimer rules are not available to the donor or transferor of the property, but are only available to the donee or transferee of the property. The ruling is clearly correct inasmuch as it requires a "transfer" of property before the disclaimer provisions can be activated. Since W died prior to the occurrence of a "transfer" of property, the "transfer" requirement has not been satisfied.

D. Disclaimer of Less Than Entire Interest

Section 2518 allows the disclaimer with respect to "an undivided portion of an interest."⁵⁸ The meaning of the phrase "an undivided portion of an interest" is unclear.⁵⁹ Consequently, a devisee is faced with the dilemma of whether the disclaimer of any of the following interests will be qualified: a fractional interest in property (an undivided one half interest), a portion of a pecuniary devise (\$25,000 of a \$50,000 devise), a portion of a specific devise (five acres of a ten acre tract) or a carved out interest (a life estate or a remainder from a fee).

Prior to the publication of the proposed regulations, many commentators believed that fractional and pecuniary interests in property could be disclaimed whereas a carved out interest could not.⁶⁰ The proposed regulations seem to allow disclaimers of fractional interests as well as some forms of pecuniary and carved out interests. The Regulations attempt to clarify this uncertainty by formulating various highly complex and totally arbitrary rules.⁶¹ The paragraphs which follow attempt to explain and analyze these rules.

57. I.R.S. Letter Ruling 8130069, April 29, 1981.

58. I.R.C. § 2518(c)(1) (1976).

59. See Frimmer, *supra* note 5, at 322 (1978) and Note, *supra* note 5, at 202.

60. See Frimmer, *supra* note 5, at 322 (1978) and Note, *supra* note 5, at 202.

61. Prop. Reg. § 25.2518-3(a)(1), 45 Fed. Reg. 48,922 (1980) (to be codified at § 26 C.F.R. § 25.2518).

Partial Interest Rule

The first rule with respect to the disclaimer of an undivided portion of an interest is called "disclaimer of a partial interest."⁶² The rule reads as follows: "[i]f the requirements of this section are met, the disclaimer of an *entire interest* in property may be qualified disclaimer even if the disclaimer has another interest in the same property."⁶³ It is rather curious that the above quoted sentence uses the term "entire interest" and the section of the proposed regulations in which it appears is entitled "disclaimer of less than entire interest."⁶⁴ Moreover, the subsection of the proposed regulations in which that sentence appears is entitled "[d]isclaimer of a partial interest."⁶⁵ This seems to evidence the fact that the IRS has not adequately defined the terms "interest", "entire interest", and "partial interest."

The specific requirements of this first rule of partial disclaimers, although never clearly articulated in the proposed regulation, appear to center around the divisibility or aggregation of interests in a single piece of property. That is, whether the various interests of a disclaimant in a single piece of property should be aggregated and treated as one, or should be treated as separate divisible elements of a single piece of property. If the interests are considered divisible, the disclaimant may disclaim one interest and retain the other; if the interests are aggregated (i.e. treated as one), the disclaimant may only disclaim an undivided portion of his interest as aggregated.

In order to apply the aggregation rules discussed above, criteria must be established to determine whether various interests in a single piece of property should be aggregated. The proposed regulations contain two such rules.⁶⁶ The first rule is that all income interests beneficially owned by a person shall be treated as one interest in property, and all beneficial interests in corpus shall be treated as one interest.

62. Prop. Reg. § 25.2518-3(a)(1)(i), 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518).

63. *Id.* (emphasis added).

64. Prop. Reg. § 25.2518-3, 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518).

65. Prop. Reg. § 25.2518-3(a), 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518).

66. *Id.*

For example, if Blackacre is devised with an income interest to A for ten years, an income interest to B for the next ten years, an income interest to A for the ten years after that, and then an income interest to C for ten years, remainder to A, presumably, A will be considered as having only two, not three, interests in Blackacre. A's first interest is the right to receive the income from Blackacre in years one through ten and in years twenty-one through thirty; A's second interest is the remainder interest. By aggregating each of A's income interests, the proposed regulation would not allow A to disclaim one of his income interests while retaining the other.⁶⁷ The proposed regulation would, however, allow A to disclaim his income interest and retain his corpus interest, or to retain his corpus interest and disclaim his income interest.⁶⁸

The second rule of aggregation is that if the separate interests of the disclaimant are considered as merged under state law, the disclaimant must disclaim the entire merged interest or an undivided portion of such merged interest.⁶⁹ Thus, if Blackacre is devised to A for life, remainder to A, and under state law A is considered as owning Blackacre in fee, A's disclaimer of his life estate in Blackacre will be qualified only if the disclaimer of a life estate from a fee is considered the disclaimer of an undivided interest.⁷⁰ If A's interest is not considered as merged under state law, A's income and corpus interests will be considered separate divisible interests in Blackacre and A could make a qualified disclaimer of either.⁷¹

The application of the doctrine of merger in this context, when viewed in isolation, appears reasonable. However, remembering that the intent of section 2518 was the creation of a uniform federal stan-

67. This result seems to follow from the example in the regulations where securities are devised to A for life, then to B for life, remainder to A's estate. The regulation states that A could disclaim his income interest, his remainder interest or an undivided portion of either; however, the regulations specifically state that A could not disclaim a ten year income interest from his life estate. The IRS must therefore not consider the disclaimer of a ten year from a life interest a disclaimer of an undivided portion of an interest. Prop. Reg. § 25.2518-3(a)(1)(i). *But see* Prop. Reg. § 25.2518-3(d) example 4 where a disclaimant of 40% of an income interest was qualified.

68. Prop. Reg. § 25.2518-3(a)(1)(i), 3(d) example 8.

69. *Id.*

70. This issue is discussed further at text accompanying notes 95-97.

71. *See* Prop. Reg. § 25.2518-3(a).

dard for disclaimers, reliance upon state law to determine whether a disclaimant possesses divisible interests in a single piece of property appears to be another digression thwarting the uniform application of the statute. This can be illustrated by the following example. A devises Blackacre to B with B having an income interest until he attains age 40, then to B or B's estate. If in state #1 B's interests in Blackacre are not merged, B's disclaimer or his income interest and/or his remainder interest will be qualified. In state #2, if B's interests in Blackacre are merged, B cannot disclaim solely his income interest (or his remainder interest) in Blackacre;⁷² however, B can disclaim a portion of Blackacre if his disclaimer satisfies the undivided portion rule.⁷³

Possibly the most distressing provision of the proposed regulation dealing with partial disclaimers is contained in the following sentence: "[m]oreover, if the property is divided in a manner that would permit the disclaimant to avoid the limitations of section 2518, the separate interests created by the grantor are treated as one indivisible interest."⁷⁴ The meaning of that sentence is totally unclear. If this is an IRS attempt to include a catchall in the regulations so that any disclaimer which it deems objectionable will be caught and treated as a taxable transfer, that sentence will contravene the entire purpose of section 2518 and inhibit the use of a provision of the Code which Congress intended to make available to taxpayers. If that sentence is merely intended to deal with a specific fact situation contemplated by the IRS, the IRS should address that situation in more specific terms.⁷⁵

The regulations illustrate the application of this avoidance concept in one example. In that example, C devised $\frac{1}{3}$ of his residuary estate to D with any disclaimed property to E, $\frac{1}{3}$ of his residuary estate to D with any disclaimed property to F and $\frac{1}{3}$ of his residuary estate to D with any disclaimed property to G. The regulation concludes that D's disclaimer of the $\frac{1}{3}$ of the residuary estate which passes to E is not qualified because C divided the property in a manner that would permit

72. Prop. Reg. § 25.2518-3(a)(1)(i).

73. See the discussion in text accompanying notes 95-97.

74. Prop. Reg. § 25.2518-3(a)(1)(i).

75. *C.f.* the trust rule which is discussed in text accompanying notes 86-97, i.e. split transfer into separate trusts or make greater than one transfer so the disclaimant can disclaim part (avoid aggregation).

the disclaimant to avoid the limitations of section 2518.⁷⁶ It is not intuitively obvious why the IRS finds the facts of that example objectionable. If the remainder was devised in toto to D, D could clearly have disclaimed an undivided $\frac{1}{3}$ interest in the property.⁷⁷ Moreover, D may have been able to disclaim 33 $\frac{1}{3}$ % of the value of the remainder.⁷⁸ In light of D's ability to disclaim $\frac{1}{3}$ of the property notwithstanding C's perceived attempt to avoid the limitations of section 2518, the IRS's only objection could be that C or D has directed the person to whom the property is passing. If the IRS's objection to the disclaimer in the example discussed above is the disclaimant's disposition of the disclaimed property, it is curious that this provision was not placed in the section of the proposed regulations dealing with the disclaimant's direction of the property.

A more fundamental question is whether the actions taken by C and/or D constitute a transgression of the prohibition of directing the passage of the property. Section 2518(b)(4) clearly provides that the *person making the disclaimer* may not direct the passage of the disclaimed property. No mention is made of any prohibition of the actions of a person other than the disclaimant. Therefore, the actions of C, in directing who will receive the disclaimed property is not relevant to the qualifications of D's disclaimer.

Has D directed the passage of the property by virtue of his disclaiming a portion of a homogeneous property? Arguably, if the property is homogeneous, D has directed the property because he has been given, in effect, the right to choose the recipient of the property he partially disclaims among a group of three, E, F and G. Would the result be different if C devises his home ($\frac{1}{3}$ of his estate), his business ($\frac{1}{3}$ of his estate) and his other assets ($\frac{1}{3}$ of his estate) to D with a disclaimer of his home to E, with a disclaimer of his business to F, and with a disclaimer of his other assets to G? In this situation, D does not have any right to choose among E, F or G as to who will receive the disclaimed property. Thus, D's disclaimer of any of the three specific devises should be qualified insofar as D's disclaimer will have true eco-

76. See Prop. Reg. § 25.2518-3(d) example 14.

77. Prop. Reg. § 25.2518-3(b). It may be possible under the severable property rule or the pecuniary interest rule for D to have disclaimed 33 $\frac{1}{3}$ percent of the property if it had been devised to him in total. See example 4 of Prop. Reg. § 25.2518-3(d).

78. Prop. Reg. § 25.2518-3(d); 25.2518-3(d).

nommic significance.⁷⁹

Severable Property Rule

The second rule of partial disclaimers, the "severable property rule" is a logical application of the requirement that a disclaimer must involve an undivided interest in property.⁸⁰ That rule allows a disclaimant to disclaim a severable interest in property if specific reference is made to specific items of property. Severable property is defined as "property which can be separated from other property to which it is joined and which after severance, maintains a complete and independent existence."⁸¹ The proposed regulation indicates that shares of corporate stock are severable property.⁸² Presumably, real estate will be considered severable so that the disclaimer of five acres of a ten acre tract will be qualified.⁸³

The IRS has had the opportunity to apply its definition of the term "severable property" in two recent private letter rulings.⁸⁴ In Letter Ruling 8113061, the devisee of two-thirds of a residuary estate disclaimed his interest in the residuary estate to the extent that it exceeded a debt to the estate. The IRS, although never directly stating that the portion of the residuary estate disclaimed by the devisee was severable from that which he retained, discussed the severable property rule in the paragraph immediately before the paragraph in which it concluded the disclaimer was qualified. In Letter Ruling 8145036, the IRS ruled that the disclaimer of a portion of a child's intestate share would be qualified.⁸⁵ The IRS's rationale again appeared to be the severable property rule. Since neither ruling made mention of the type or

79. *Cf.* the trust income allocation rules contained in I.R.C. § 651(b) (1954); 622(b) (1954); Treas. Reg. § 1.652(b)-2(b) (1960); the partnership allocation rules contained in I.R.C. § 707(b)(2) (1954).

80. Prop. Reg. § 25.2518-3(a)(1)(ii), 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518).

81. *Id.* See I.R.S. Letter Ruling 8113061, Dec. 31, 1980, where the IRS seems to have ruled that the remainder of an estate consists of severable property.

82. Prop. Reg. § 25.2518-3(d) example 1 contains other examples of severable property.

83. See I.R.S. Letter Ruling 8130127, April 30, 1981.

84. See I.R.S. Letter Rulings 8113061, Dec. 31, 1980; 8130127, April 30, 1981.

85. I.R.S. Letter Ruling 8145036, Aug. 11, 1981.

nature of the property owned by the estate, it appears that these rulings may support the proposition that a remainder interest is comprised of severable property, and that the IRS is interpreting the severable property rule liberally to allow the disclaimer of a specific percentage of a residuary estate.

Trust Rule

The third rule of partial disclaimers deals with the application of the first rule of partial disclaimers, the disclaimer of a partial interest⁸⁶ to property held in trust.⁸⁷ That is, all interests in trust income are treated as a single interest and all interests in trust corpus are treated as a different single interest. The proposed regulations illustrate this rule with the following example:

A disclaimer is not a qualified disclaimer under Section 2518 if the beneficiary disclaims income derived from specific properties transferred in trust while continuing to accept income derived from the remaining properties in the same trust. Similarly, since all interests in the corpus of a trust are treated as a single interest, in order to have a qualified disclaimer of an interest in corpus the disclaimant must disclaim all such interests, either totally or as an undivided portion.⁸⁸

The language of the above quoted example appears to create a distinction between a partial disclaimer of an income interest in trust property and a partial disclaimer of an interest in the corpus of a trust. This distinction arises as a result of the omission of the qualifying language that "the disclaimant must disclaim all such interests, either totally or as an undivided portion"⁸⁹ from the portion of the example dealing with the partial disclaimer of an income interest.

The IRS's interpretation of the interrelation between the "severable property rule" and the "trust rule" creates another artificial distinction in determining whether a partial disclaimer is qualified. Although

86. See *supra* text accompanying notes 62-75.

87. Prop. Reg. § 25.2518-3(a)(2), 45 Fed. Reg. 48,922 (1980) (to be codified at 26 C.F.R. § 25.2518).

88. *Id.*

89. *Id.*

the IRS seems to take the position that severable items of property lose their identity as severable property when placed in trust,⁹⁰ there does not appear to be any justifiable reason for distinguishing between a situation where A makes a gift to B of a life interest in two paintings followed by B's disclaimer of one life interest, and the situation where A creates a trust with the two paintings as the corpus giving B an income interest in the trust followed by B's disclaimer of the income generated by one specific painting. In the first situation, B's income interests in each painting will be considered severable property and therefore B's disclaimer of his life estate in one of the paintings will be qualified.⁹¹ The language of the proposed regulation seems to consider the disclaimer in the second situation to be disqualified merely because the property has been placed in trust.⁹² The final regulations will hopefully clarify this situation.

If taxable transfers to the same trust are made at different times or by different transferors, a qualified disclaimer is permitted with respect to each transfer, because each transfer will be treated as though it were a transfer to a separate trust.⁹³ Query: is it possible to avoid the partial disclaimer rules as they apply to trusts by transferring property to a trust in installments? For example, will the result in the first situation posed above be different if A transferred painting number 1 to the trust on January 1, 1982, and transferred painting number 2 to the trust on January 2, 1982. Would the result be different if painting number 2 were transferred on January 1, 1983?⁹⁴

90. Prop. Reg. § 25.2518-3(a)(1)(ii). *But see* Prop. Reg. § 25.2518-3(a)(1)(i); I.R.S. Letter Ruling 8212061, Dec. 24, 1981 and I.R.S. Letter Ruling 7913084, Dec. 28, 1978. In Letter Ruling 7913084, Dec. 28, 1978, the IRS ruled that the beneficiary of a trust may disclaim all, or a specified undivided portion (for example 1/20 of your 1/2 interest in the trust) or all your interest (principal and income) in a specified asset or assets"

91. Prop. Reg. § 25.2518-3(a)(1)(ii).

92. Prop. Reg. § 25.2518-3(a)(2). See example 5 of Prop. Reg. § 25.2518-3(d).

93. Prop. Reg. § 25.2518-3(a)(2).

94. See Prop. Reg. § 25.2518-3(a)(1)(i). Is this a situation where the IRS would attempt to invoke that provision of the proposed regulations? On its face, that provision appears applicable because the property has not been "divided". The IRS may take the position that the proximity in time of the transfers require their aggregation notwithstanding the proposed regulation.

Undivided Portion Rule

The “undivided portion rule” of partial disclaimers seems to be the IRS’s attempt to interpret the language of section 2518 which allows the disclaimer of an undivided portion of an interest.⁹⁵ The proposed regulations define the term “undivided portion of an interest” as:

. . . a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant’s interest in such property and in other property into which such property is converted. A disclaimer which disclaims some specific rights and retains other rights with respect to an interest in the property is not a qualified disclaimer of an undivided portion of the disclaimant’s entire interest in property. Thus, for example a disclaimer is not a qualified disclaimer if the disclaimant disclaims the fee simple in Blackacre, but retains a life estate.⁹⁶

Thus, the proposed regulation seems to expressly sanction the disclaimer of an undivided one-half interest in a fee.⁹⁷

Pecuniary Interest Rule

The fourth rule of partial disclaimers, the “pecuniary interest rule,” seems to be a logical interpretation of the term “undivided portion of an interest”.⁹⁸ That rule allows the disclaimer of part of a specific pecuniary amount. Thus, the disclaimer of \$10,000 of a \$50,000 bequest will be considered the disclaimer of an undivided portion of an interest.

The definition of a specific pecuniary amount is not clear. For example, the proposed regulations advise us that V, the devisee of the income from a 500 acre farm, could make a qualified disclaimer of 40% of his income interest in the farm.⁹⁹ The example is intended to illustrate the disclaimer of a part of a specific pecuniary amount.¹⁰⁰

95. I.R.C. § 2518(c)(1).

96. Prop. Reg. § 25.2518-3(b).

97. *Id.*

98. Prop. Reg. § 25.2518-3(c).

99. Prop. Reg. § 25.2518-3(c) example 4.

100. This is apparent by the reference in section 25.2518-3(c) to the example.

The application of the pecuniary interest rule appears to be at odds with the application of the partial interest rule,¹⁰¹ the trust rule¹⁰² and the undivided portion rule.¹⁰³ Those rules provide that the disclaimer of an income interest for ten years from a life estate would not be qualified. If an income interest is considered a specific pecuniary amount,¹⁰⁴ the pecuniary interest rule, which only specifies that "part" of the specific pecuniary amount must be disclaimed, should be interpreted to allow that disclaimer. There does not appear to be a logical reason for treating the disclaimer of 40% of a life interest as qualified, while treating the disclaimer of a ten year income interest from a life estate as not qualified.

E. Nine-Month Rule

Prior to the enactment of section 2518, the regulations provided that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer."¹⁰⁵ On its face, this requirement seemed logical and understandable. However, the reasonable time requirement became an unworkable standard for determining the federal tax consequences of a disclaimer.¹⁰⁶ The primary problem in using such a standard was the fact it had to be applied on a case by case basis.¹⁰⁷ There-

101. Prop. Reg. § 25.2518-3(a)(1)(i).

102. Prop. Reg. § 25.2518-3(a).

103. Prop. Reg. § 35.2518-3(a)(2).

104. This result seems to follow proposed regulations section 25.2518-3(D) example 4.

105. For a collection of cases illustrating this point, see W. PAGE, PAGE ON THE LAW OF WILLS 46, 46-47, nn.5-9 (1960). There was both a common law requirement of reasonable time and a federal law requirement of reasonable time. However, in many cases, they were treated as a single standard. See *Keniath v. Comm'r*, 480 F.2d 57, 61 (8th Cir. 1973); *Estate of Rolin v. Comm'r*, 68 T.C. 919, 927 (1977); *Estate of Dreyer v. Comm'r*, 68 T.C. 275, 291 (1977), *acq.* 1978-12 I.R.B. 6 *Contra*, *Jewett v. Comm'r*, 70 T.C. 430, 436 (1978). See also *Treas. Reg. § 25.2511-1(c)* (1972).

106. WAYS AND MEANS COMM. REPORT, *supra* note 6, at 66-67.

107. See *Estate of Dreyer v. Comm'r*, 68 T.C. 275 (1977). Therein the court held: "[w]hat is the reasonable time varies with the circumstances of each case. The time may be very long if injury to others will not result." *Id.* at 293 (citing *In re Estate of Mexter*, 83 Misc. 2d 290, —, 372 N.Y.S.2d 296, 299 (N.Y. Country Surr. Ct. 1975)).

fore, prior to the enactment of section 2518, it was nearly impossible to decide with certainty whether a disclaimer was made within a reasonable time.

The Eighth Circuit's decision in *Kenai v. Commissioner*¹⁰⁸ was primarily responsible for the enactment of the nine-month rule. In *Kenai*, the disclaimant had a vested remainder subject to divestiture. The disclaimer was made nineteen years after the creation of the interest but only six months after the death of the life beneficiary. The court was faced with the difficult question of determining when the period of reasonable time commences. The Tax Court¹⁰⁹ held that a reasonable time should be interpreted according to a federal standard,¹¹⁰ and nineteen years was held not to be a reasonable time. The Eighth Circuit reversed the Tax Court saying:

In determining 'reasonable time' and the related issue of when the reasonable time commences, we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states. We are not conclusively bound by the state law, but this is the only field to probe for legal decisions and discussions on the phrase 'reasonable time' as used in the context of making valid disclaimers.¹¹¹

After examining many authorities, the court concluded that when a vested interest subject to divestiture is involved, the reasonable time period commences after the death of the life beneficiary, not at the time the interest was created.¹¹² The result in *Kenai* was a disclaimer

108. 480 F.2d 57 (8th Cir. 1973); WAYS AND MEANS COMM. REPORT, *supra* note 6, at 66-67.

109. 58 T.C. 352 (1972).

110. The Tax Court relied on *Fuller v. Comm'r*, 37 T.C. 147 (1961) which held a disclaimer 25 years after the creation of the interest was not within a reasonable time. These Tax Court decisions create a federal standard, which measures a reasonable time from the creation of the interest whether the interest is a present interest or a future interest, and whether it is vested or contingent. See *Jewett v. Comm'r*, 102 S. Ct. 1082 (1982).

111. 480 F.2d at 61.

112. We hold . . . that under the prevailing common law and, in particular, the jurisdiction of the State of Minnesota the holder of a vested remainder interest subject to divestiture has a reasonable time within which to renounce or disclaim the remainder interest after the death of the life

made nineteen years after the creation of the interest, but six months after the death of the life beneficiary, was within a reasonable time. At that point, it became clear that allowing local law to dictate what a "reasonable time" was presented an inadequate method of determining the federal tax consequences of a disclaimer.

Section 2518 eliminated the confusion surrounding the reasonable time rule by requiring the disclaimer to be made not later than nine months after the date on which the transfer creating the interest in such person is made.¹¹³ Section 2518, however, does not eliminate the confusion surrounding the issue of when the transfer creating the interest occurs.

The Supreme Court has recently decided a pre-Section 2518 disclaimer case in which the question presented was when did the "transfer" creating the interest occur.¹¹⁴ The Court held that the disclaimer by a trust beneficiary of a contingent interest in a testamentary trust thirty-three years after the trust was created, but while the interest was still contingent, was a taxable transfer because the word "transfer" includes the creation of future interests and contingent remainders.¹¹⁵ Thus, the Supreme Court interpreted "transfer" as taxable transfer.

The proposed regulations provide that the nine month period is determined with reference to each taxable transfer.¹¹⁶ A taxable transfer occurs with respect to *intervivos* transfers when there is a completed gift for federal gift tax purposes; a taxable transfer occurs with respect to testamentary transfers upon the date of decedent's death.¹¹⁷ This definition is in accord with the definition of transfer intended by Congress.¹¹⁸

If transfer is defined as taxable transfer, it necessarily follows that

beneficiary and that an unequivocal disclaimer filed within six months thereof is made within a reasonable time.

Id. at 64; *contra Jewett*, 102 S. Ct. 1082. In *Jewett*, the court measured the time from the creation of the interest, rather than the interest became indefeasibly fixed, and concluded 30 years was not reasonable.

113. I.R.C. § 2518(b)(2)(A).

114. *Jewett*, 102 S. Ct. 1082.

115. *Id.*

116. Prop. Reg. § 25.2518-2(c)(2).

117. *Id.* See also I.R.S. Letter Ruling 8008078, Nov. 28, 1979.

118. CONFERENCE REPORT ACCOMPANYING H.R.-14844, H.R. REP. NO. 94-1515, 94th Cong., 2d Sess. 623-24 (1976).

the disclaimer of certain interests in property will become almost impossible. One such interest in property is created by the exercise of a special power of appointment. Where a donee is given a special power, the gift (or devise) is a taxable transfer. The donee must disclaim within nine months from that date in order for the disclaimer to be "qualified." If the donee chooses not to disclaim and subsequently exercises the power, the appointee's disclaimer must be made within nine months of the transfer of the power to the donee for it to be qualified. The nine months do not begin when the power is exercised since the exercise of a special power is not a taxable transfer.¹¹⁹ Consequently, the "transfer" creating the appointee's interest is the creation of the power. The harshness of this interpretation is somewhat ameliorated by the extension of the nine month disclaimer period for disclaimants less than twenty-one years of age.

In many cases, the donee of the power will refrain from exercising it for a period in excess of nine months. In such cases, the appointee will be precluded from making a qualified disclaimer even though as he is unaware of his interest until it is too late.

In addition to making a qualified disclaimer of some interests impossible, Congress' definition of transfer as taxable transfer allows some "qualified" disclaimers to be made many years after the interest was created. If we assume that a special power of appointment can reach the hands of the holder of the power without the occurrence of a taxable transfer (which can easily happen when the holder acquired it for full and adequate consideration, for example section 2516), when will the nine month period begin for the appointee under the special

119. The exercise of a special power of appointment is not a transfer (completed gift for gift tax purposes). See I.R.C. § 2514 (1954) and *Self v. United States*, 142 F. Supp. 939 (Ct. Cl. 1956). The death of B with a special power of appointment is not a taxable transfer. See I.R.C. § 2041 (1954); *Clauson v. Vaughan*, 147 F.2d 84 (1st Cir. 1945); *James v. Reynolds*, 57 F. Supp. 609 (D. Minn. 1944). The reason the exercise of a special power of appointment is not a transfer is because powers of appointment are not interests in property. The following cases, although prior to I.R.C. § 2041, are useful to demonstrate that a power of appointment (general or special) is not an interest in property. *Helvering v. Safe Deposit & Trust Co.*, 316 U.S. 56 (1942), *rev'g* 121 F.2d 307, *aff'd*, 42 BTA 145; *United States v. Field*, 255 U.S. 257 (1921). The exercise of a general power of appointment is a transfer because of I.R.C. § 2514 and a general power of appointment is included in a decedent's gross estate because of I.R.C. § 2041 (not I.R.C. § 2033).

power? It is easier to determine when the nine month period does not begin. We know it does not begin when the holder acquired the power since that is not a "transfer." We know it does not begin when the power is exercised since the exercise of the special power is not a "transfer." Insofar as no other events occurred, we must conclude that the period never commenced. Logic tells us that a period which never commenced can never end. Therefore, in certain situations, the appointee may have the opportunity to disclaim many years later (assuming he has not accepted the interest or its benefits) and have it qualify.

The result in the above discussion would be vastly different if the donee is given a general power as opposed to a special power. Since the exercise of a general power is a taxable transfer,¹²⁰ the appointee will have nine months from the exercise of the power in which to disclaim. Thus, an appointee under a general power will always have nine months to disclaim;¹²¹ whereas, the appointee under a special power (especially if it is a testamentary power) will rarely have such an opportunity.

The obvious question that arises regarding the commencement of the nine-month period, is whether a disclaimer of property passing by the exercise of a special power should be treated differently than a disclaimer of property passing by the exercise of a general power. If we focus upon the disclaimant's right to disclaim, there is no justification for such a distinction. The appointees under both the general and the special power are similarly situated. They have no way of knowing if they will be appointed, when they will be appointed or what they will receive if appointed. In each case, their ownership arises as a result of the exercise of the power. Therefore, it is of little concern to the appointee what type of power the holder exercised.

The sole distinction between a general and a special power is with

120. See I.R.C. §§ 2514 & 2041; Treas. Reg. § 25.2514-1(a)(1) (1958).

121. CONFERENCE REPORT ACCOMPANYING H.R. 14844, H.R. REP. NO. 94-1515, 94th Cong., 2d Sess. 623-24 (1976). The report gives the following example:

[I]n the case of a general power of appointment where the other requirements are satisfied, the person who would be the holder of the power will have a 9 month period after the creation of the power in which to disclaim and the person to whom the property would pass by reason of the exercise or lapse of the power would have a 9 month period after a taxable exercise, etc., by the holder of the power in which to disclaim.

respect to the federal taxation of the holder of the power. The holder of a general power is taxed upon its exercise; the holder of a special power is not.¹²² The imposition of a transfer tax upon the holder of the power is an inadequate basis to justify disallowing the disclaimer by an appointee under special power (if made within nine months of the exercise of the power), since the tax is unrelated to the rights of the appointee. Therefore, it is unreasonable to require the disclaimer made by an appointee under special power be within nine months of the transfer creating the power (which may be prior to the exercise of the power), when an appointee under a general power is permitted to disclaim within nine months after the exercise of the power. To remedy this unwarranted distinction, as well as to cure the situation where no transfer occurs, section 2518 should be amended or regulations promulgated defining transfer in a manner which treats the appointee under a general and a special power similarly in all cases. Florida Statutes section 732.801¹²³ provides an excellent example of when an interest must be disclaimed to assure that the recipient of any interest in property has a fair opportunity to disclaim:

(5) Time for Filing Disclaimer — A disclaimer shall be recorded at any time after the creation of the interest, but in any event within 9 months after the event giving rise to the right to disclaim, including the death of the decedent; or, if the disclaimant is not finally ascertained as a beneficiary or his interest has not become indefeasibly fixed both in quality and quantity at the death of the decedent, then the disclaimer shall be recorded not later than 6 months after the event that would cause him to become finally ascertained and his interest to become indefeasibly fixed both in quality and in quantity.¹²⁴

The requirement that the disclaimant not accept any interest in the disclaimed property provides an adequate safeguard to prevent any abuse that may arise as a result of allowing additional interests to be disclaimed.

122. See I.R.C. § 2514 & 2041; Treas. Reg. § 25.2514-1(a)(1) (1958). The Generation Skipping Tax rules contained in I.R.C. § 2601-2614 may provide the required "taxable transfer" in certain situations where special powers are created.

123. FLA. STAT. § 732.801(5) (1977).

124. *Id.*

Formula Clauses

It is often impossible to determine whether or not a disclaimer should be made or the amount of property which should be disclaimed within nine months from the date the property was transferred. In large estates, the property may not yet have been valued and there may be considerable litigation concerning the title to property as well as the validity of claims filed against the estate. Thus, the disclaimant may be faced with the dilemma of guessing whether a disclaimer is necessary or how much property he must disclaim. Section 2518 does not expressly provide a disclaimant relief from this problem.

In several private letter rulings, the IRS has ruled that a partial disclaimer will be qualified where the disclaimant uses a formula based disclaimer.¹²⁵ For example, a beneficiary's disclaimer of only so much of the decedent's estate as is needed to cause property equal to the optimal marital deduction to pass to the surviving spouse will be qualified.¹²⁶ This is a logical as well as practical interpretation of the statute.

F. Acceptance of Benefits

Both the common law of disclaimers and Section 2518 provide that the disclaimant must not accept any of the benefits of the disclaimed property for the disclaimer to be qualified. The proposed regulations similarly provide that the disclaimant cannot expressly or "impliedly" accept the benefits of the disclaimed property prior to making the disclaimer.¹²⁷ If the disclaimant is also a fiduciary, his actions in such capacity to preserve or maintain the property are not considered an acceptance of the benefits of the property.¹²⁸ The proposed regulations do not define the term "implied acceptance" other than by the use of one example.¹²⁹ In that example, Blackacre was devised to A. A never resided in Blackacre, but when the property taxes became due A

125. I.R.C. Letter Rulings 8145036, Aug. 11, 1981; 8130127, April 30, 1981; 7913119, Dec. 19, 1978.

126. I.R.S. Letter Ruling 7913119, Dec. 19, 1978.

127. Prop. Reg. § 25.2518-2(d)(1)(i).

128. Prop. Reg. § 25.2518-2(d)(1)(ii).

129. Prop. Reg. § 25.2518-2(d)(1)(iii) example 3.

paid them out of his personal funds. A later attempted to disclaim Blackacre. The example concludes that A's payment of the property taxes was an "implied acceptance" of Blackacre. That result seems to be an extremely harsh interpretation of the non-acceptance requirement in light of the fact that A was merely intending to preserve the property. If this example is altered to provide that A, instead of paying the property taxes, made a monthly mortgage payment on property devised to him subject to a mortgage, presumably the IRS would consider the mortgage payment an "implied acceptance".

It is doubtful that Congress intended the nine month period for disclaimers to be shortened where there is a gift or devise of encumbered property. In the case of a family residence, the beneficiary or devisee will be faced with the dilemma of deciding whether to disclaim the property prior to the first mortgage payment becoming due or to not make the payment of the mortgage and possibly causing a default and/or foreclosure.

The IRS in several recent private letter rulings has taken a more rational position with respect to acceptance of benefits.¹³⁰ In letter ruling 8140025, the IRS ruled that the disclaimant's payment of utility and light bills on property later disclaimed by the executor of the disclaimant did not constitute an acceptance of the benefits of the property.¹³¹ It is difficult to find a conceptual distinction between paying the property taxes on devised real property and paying the utility and light bills on such property. Hopefully, the final regulations will be more coherent in this respect.

In an example in the proposed regulations, the IRS has taken an erroneous position with respect to the interaction between the nine month rule and the acceptance of benefits rule.¹³² In that example, ten shares of stock were given to H under the State X uniform gift to minors act. Majority in state X is eighteen. At the time of the gift, H was fifteen years old. Upon attainment of the age of eighteen, the ten shares were delivered and registered in H's name. H, within nine months of attaining the age of twenty-one, disclaimed the ten shares.

130. I.R.S. Letter Rulings 8140025, July 7, 1981; 7909055, Nov. 29, 1978; 7922018, Feb. 28, 1979.

131. I.R.S. Letter Ruling 8140025, July 7, 1981.

132. Prop. Reg. § 25.2518-2(d)(1)(iii) example 7.

The example concludes that H's disclaimer is not qualified because H received fee ownership of the shares on his eighteenth birthday but failed to disclaim the shares within nine months thereafter. Interestingly, the Regulation did not cite H's acceptance of the benefits of the property as its basis for concluding the disclaimer was not qualified. The conclusion in this example is clearly wrong if it is based on the fact that H's disclaimer was not qualified solely because it was not made within nine months of H's eighteenth birthday. Section 2518(b)(2)(B) clearly provides that H had nine months after the day on which he attained the age of twenty-one in which to disclaim.

It appears to be the IRS's position that the receipt of trust income by a beneficiary does not preclude the beneficiary from disclaiming his interest in corpus.¹³³ The proposed regulation illustrates this point in the following example. The current income beneficiary of a trust, B, is to receive one-half the corpus upon attainment of the age of forty. B received one income distribution and then attempted to disclaim his interest in the income and corpus of the trust. The example concludes that B's disclaimer of the income is not qualified insofar as he has accepted income prior to making the disclaimer. However, B's disclaimer of the corpus is qualified. Even though the "partial disclaimer rule" treats B's interest in income and corpus as two separate interests, the IRS is quite liberal in its interpretation that B has not accepted the benefits of the corpus in this example.

G. Use of Disclaimers as a Method of Achieving Tax Savings

Charitable Remainders

It is not uncommon for individuals to make charitable dispositions of their property upon their death. One popular form of charitable transfer is the creation of a trust, inter vivos or testamentary, with the corpus passing to a charity upon the occurrence of a stated event or the expiration of a stated number of years.¹³⁴ To be deductible for estate tax purposes, the transfer of a remainder interest in trust property must qualify as a charitable remainder annuity trust or a charitable remain-

133. Prop. Reg. § 25.2518-2(d)(1)(iii) example 1.

134. See I.R.C. § 2055 (1955).

der unitrust.¹³⁵ There are numerous highly technical requirements which must be satisfied for a trust to fall into these categories.¹³⁶ If for any reason a trust fails to satisfy the requirements, the estate tax deduction will be lost.¹³⁷ Therefore, extreme care must be exercised to avoid the slightest transgression of the charitable transfer rules.

If a decedent makes a transfer of a remainder interest to a charity which is not in the required form, it is still possible to salvage a charitable deduction for the decedent's estate. Assume that D dies with an estate of \$100,000,000 and his will creates a trust with a corpus of \$50,000,000 for the benefit of his son, S, for life, remainder to Nova Law Center. Under the terms of the trust, S is guaranteed an annual distribution of \$2,000,000 and the trustee has the power to invade corpus for the benefit of S. The trust is not a charitable remainder annuity trust or unitrust because S does not have the right to receive at least 5% of the initial corpus annually and an amount other than the payment of a sum certain (or fixed percentage) of corpus may be paid to S.¹³⁸ Therefore, D's estate will not be entitled to a charitable deduction.

If S disclaims each of his interests in the trust, the transfer will be deemed to have been made directly from D to Nova Law Center¹³⁹ which entitle D (or his estate) to a charitable deduction. Therefore, S's disclaimer of his interest in the trust will salvage the charitable deduction for D's estate.¹⁴⁰

Marital Deduction and Unified Credit

A 1978 amendment to section 2518 made it possible for property to pass to a decedent's spouse as a result of a disclaimer even if the

135. I.R.C. § 2055(e)(2)(A) (1974).

136. See I.R.C. § 664(d)(1)(2) (1954).

137. I.R.C. § 2055(e)(2).

138. I.R.C. § 664(d)(1)(B), (d)(2)(B).

139. Letter Ruling 8031018, March 21, 1980. See also Rev. Rul. 78-152, 1978-2 C.B. 296.

140. Rev. Rul. 78-152, 1978-2 C.B. 296. In Letter Ruling 8031018, March 21, 1980, the IRS ruled that as a result of a beneficiary's disclaimer, his income interest never arose, thus, the charity was considered as having received its interest in the estate immediately.

surviving spouse was the disclaimant.¹⁴¹ This amendment is important because it allows a surviving spouse to disclaim an interest in a marital trust and take the property under a non-marital trust assuming the decedent's will is set up properly.¹⁴² A spouse will only make such a disclaimer when the marital bequest exceeds the "optimal" marital deduction.¹⁴³ One common situation where the marital bequest exceeds the optimal marital deduction occurs where the decedent's will fails to take the unified credit into consideration when funding the marital trust. The estate of every decedent who was a citizen or resident of the United States at the time of death is entitled to a credit against his estate tax.¹⁴⁴ In 1982, the credit is \$62,800.¹⁴⁵ The \$62,800 credit means that a taxable estate of \$225,000 or less will not have to pay any estate tax.

Sound estate planning dictates that the decedent's taxable estate not be less than the amount of the credit against estate tax available to the decedent.¹⁴⁶ The concept is illustrated by the following example. D dies with a gross estate of \$450,000. His wife, W, has no separate property. D wishes to avoid all estate tax upon his and W's death. D's will provides:

If my spouse survives me, I give to my trustee, hereinafter named,

141. Tax Reform Act of 1978, Pub. L. No. 95-600, § 702(M), 92 Stat. 2934 (1978), amended I.R.C. § 2518(b)(4).

142. The decedent's will must contain a marital bequest (one which qualifies for the marital deduction) and a non-marital bequest (one which does not qualify for the marital deduction and does not cause the property to be included in the spouse's gross estate), with the decedent's spouse named as the beneficiary under each trust. The non-marital trust should be drafted in manner so as to give the spouse all the incidents of ownership consistent with its exclusion from the spouse's gross estate. In addition, it is advisable to include in the decedent's will a clause which provides that any property disclaimed shall pass to the non-marital trust.

143. The optimal marital deduction is not necessarily the maximum marital deduction allowable because consideration must be made for items such as the unified credit and other deductions available to the estate.

144. I.R.C. § 2010 (1976).

145. I.R.C. § 2010(b) (1976).

146. If the taxable estate is less than the credit, the excess of the credit over the decedent's estate tax liability will be wasted. The credit is also used to reduce the tax payable on certain gifts made during the decedent's lifetime, thus, the entire credit may not be available at the decedent's death.

a pecuniary amount equal to the maximum marital deduction allowable to my estate for federal estate tax purposes, less the aggregate amount of marital deductions, if any, allowed for interests in property passing or which have passed to my spouse otherwise than by the terms of this article.

Since ERTA 1981, the maximum marital deduction is 100% of D's gross estate.¹⁴⁷ Therefore, the provision of D's will transfers D's entire estate—\$450,000—to a marital trust created for W. Since D's estate will be entitled to a marital deduction of \$450,000, D's taxable estate will be zero and no estate tax will be payable on D's death. W will have a taxable estate of \$450,000 because the corpus of the marital trust will be included in her estate upon her death.¹⁴⁸ If W also dies in 1982, her estate will be taxed on \$450,000, yielding a tax of \$138,800, and her estate will be entitled to a credit of \$62,800.

If D's will provided that the marital bequest was to be reduced to take into consideration the value of the credit available to D with the remainder of D's estate used to fund a non-marital trust for the benefit of W, D's estate tax would remain zero and there would be no tax payable on W's death because W's taxable estate would be limited to \$225,000 and the credit available to W's estate, \$62,800, would reduce the tax to zero.¹⁴⁹ Thus, no estate tax would be payable on the death of D and W, an estate tax savings of \$76,000 over the situation above.

In those situations where a decedent's will does not allow for the reduction of the marital bequest by the amount of credit available to the decedent's estate, the situation can be corrected by having the decedent's spouse disclaim the portion of the marital bequest which is necessary to allow the decedent to make full use of his credit. In the situation posed above, W would disclaim \$225,000.

The benefits to be derived by such a disclaimer are the securing of the optimal marital deduction and the exclusion of the disclaimed property from the disclaimant's gross estate. In theory such a disclaimer is

147. ERTA 1981.

148. I.R.C. § 2056 (1954) (amended by 1981 ERTA). I assume that the marital trust was a qualified terminable interest trust.

149. See I.R.C. §§ 2033-2042 (1976). The non-marital portion (\$225,000) would not be included in W's estate because she would not have an interest in property of a character which is includible in her estate.

an effective post mortem estate planning device, but before a spouse makes such a disclaimer, he or she will have to be convinced that it is a beneficial course of action. The proposed regulations inhibit the ability of a surviving spouse to disclaim in this circumstance by providing that "[i]f the surviving spouse . . . retains the right to direct the beneficial enjoyment of the disclaimed property in a transfer that is not subject to Federal estate and gift tax, such spouse will be treated as directing the beneficial enjoyment of the disclaimed property."¹⁵⁰ The proposed regulation should be revised to provide that the typical powers given to a surviving spouse as part of a non-marital trust should not taint an otherwise qualified disclaimer.

Special Use Valuation

Generally, the property included in a decedent's gross estate is valued at its fair market value at the date of the decedent's death.¹⁵¹ If certain conditions are satisfied, real property included in a decedent's estate will be valued on the basis of its current use rather than its fair market value.¹⁵² To be eligible for the special valuation, the real property must be used for farming or other closely held business purposes and must pass to a qualified heir.¹⁵³ A qualified heir includes an ancestor or lineal descendant of the decedent and the decedent's spouse or parent.¹⁵⁴ The IRS has ruled that a devise of real property not satisfying the requirements for special use valuation may be effected by the use of a disclaimer.¹⁵⁵ In that ruling, a farm was bequeathed to A, a

150. If the marital trust is a qualified terminable interest trust, the property interests the spouse receives in the non-marital trust are extremely similar to the property interests that spouse had in the marital trust. The spouse can receive, under a non-marital trust, the following: a life estate, a special power of appointment, a five and five general power of appointment, a general power of appointment subject to an ascertainable standard, and the trustee can be given the power to invade the corpus for the spouse's comfort or maintenance. But see proposed regulations section 25.2518-2(e)(2) which requires the surviving spouse to give up certain of the powers that the spouse could otherwise enjoy as part of the non-marital trust.

151. See I.R.C. § 2031(a) (1954).

152. I.R.C. § 2032A (1976).

153. I.R.C. § 2032A(e)(2) (1976).

154. *Id.*

155. Rev. Rul. 82-140, 1982-29 I.R.B. 9.

qualifying heir, and A was given a testamentary special power of appointment. The class of permissible appointees available to A included non-qualifying heirs. Since A had the power to appoint the property to non-qualifying heirs, the property did not qualify for special use valuation.¹⁵⁶ The IRS ruled that the disclaimer by A of his special power of appointment made it possible for the property to be specially valued because, as a result of the disclaimer, the remainder vested in a qualified heir.¹⁵⁷

IV. Conclusion

This article has attempted to trace the law of disclaimers from the date of enactment of section 2518 in 1976, to the present. In the six year period beginning with the enactment of section 2518, the IRS has not issued final regulations. Moreover, the IRS has interpreted section 2518 in a manner that caused Congress to amend that section in 1981 to carry out the expressed purpose of the 1976 legislation.

On July 22, 1980, the IRS published proposed regulations interpreting section 2518. Those regulations contain many definitional flaws and examples which at best are misleading. The treatment of the disclaimer of jointly held property in the proposed regulations clearly impose rules not contained in the statute and effectively prohibits the disclaimer of most interests in jointly held property. The IRS has created numerous vague and arbitrary tests for determining whether partial disclaimers are valid. One major shortcoming with the IRS approach is reliance upon state law to determine whether a partial disclaimer is qualified.

It is distressing that the IRS has yet to issue final regulations, and has continued, in one way or another, to impose the peculiarities of state law upon section 2518. Hopefully, the IRS will carefully review the proposed regulations and rethink its position.

156. *Id.*

157. *Id.*

Shared Parental Responsibility: Florida Statutes Section 61.13

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I. Introduction

Utilizing a unique term "shared responsibility," the Florida legislature, by enacting Florida Statutes section 61.13(2)(b)(3),¹ has joined

1. FLA. STAT. § 61.13 (1982) (effective July 1, 1982).

the expanding number of states² authorizing the elevation of joint custody to a preferred status.³ The words "joint custody" are conspicuously and intentionally absent in the wording of the statute.⁴ The absence allows courts to continue the exercise of broad discretionary powers when determining custody disputes involving children in Florida.⁵ This statute establishes as the public policy of this state that each

2. The total number of states with some form of joint custody statute is 23: California (CAL. CIV. CODE § 4600.5 (West Supp. 1982)); Connecticut (CONN. GEN. STAT. § 46b-56 (1980)); Florida (FLA. STAT. § 61.13 (1982)); Hawaii (HAWAII REV. STAT. § 571-46.1 (1980)); Idaho (IDAHO CODE § 32-717B (1982)); Iowa (IOWA CODE ANN. § 598.21 (West 1979) (effective July 1, 1982)); Kansas (KAN. STAT. ANN. § 60.1610(b) (1979)); Kentucky (KY. REV. STAT. § 403.270(3) (1980)); Louisiana (LA. CIV. CODE ANN. art. 146, 157 (West 1981)); Maine (ME. REV. STAT. ANN. tit. 19, § 214 (1981)); Massachusetts (MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1981)); Michigan (MICH. COMP. LAWS ANN. § 722.23(6a) (1981)); Minnesota (MINN. STAT. ANN. § 518.17 (West 1981)); Montana (MONT. CODE ANN. § 40-4-212 (1981)); Nevada (NEV. REV. STAT. § 125.140 (1981)); New Hampshire (N.H. REV. STAT. ANN. § 458.17 (1982)); New Mexico (N.M. STAT. ANN. § 40-4.9 (1981)); North Carolina (N.C. GEN. STAT. § 50-13.2(b) (1975)); Ohio (OHIO REV. CODE ANN. § 3109.04 (1981)); Oregon (OR. REV. STAT. § 107.105 (1979)); Pennsylvania (PA. STAT. ANN. tit. 23, § 1002 (Purdon 1981)); Texas (TEX. CIV. CODE ANN. § 14.06(a) (Vernon 1979)); and Wisconsin (WIS. STAT. ANN. § 247.24(1)(b) (West 1977)).

Arizona had authorized joint custody awards by court rule. In Illinois, New Jersey and New York, court decisions broadly interpreted the language of existing custody statutes as giving the courts discretionary power to grant joint custody in appropriate cases . . . bringing the total number of states that have embraced the concept of joint custody to 27.

Joint Custody Legislation Passed By 23 States, 8 FAM. L. REP., June 29, 1982, at 2506, 2507.

3. *Id.* at 2506.

4. "In fact, the new law studiously avoids using the term "joint custody" in order to escape the detrimental connotations which that term may convey. . . ." Barkett, *From Custody to Shared Parenting - An Overview*, in ANATOMY OF SHARED PARENTAL RESPONSIBILITY 1.3a (Fla. Bar C.L.E. Course Manual 1982).

But see FLA. STAT. § 744.301(1) (1972) concerning natural guardians. The term "joint custody" appears in this statute, but a definition is not provided nor have courts in Florida used this statute as authorization for joint custody. The statute states in part: "[I]f the marriage between the parents is dissolved, the natural guardianship shall belong to the parent to whom custody of the child is awarded. If the parents are given *joint custody*, then both shall continue as natural guardians." *Id.* (emphasis added).

5. Judge Fleet of the First Circuit Court of Florida, stated on January 25, 1982 during his testimony in front of the Florida Judiciary Civil Committee meeting discuss-

minor child shall have frequent and continuing contact with both parents after a dissolution of marriage and that both parents shall be encouraged "to share the rights and responsibilities of child-rearing."⁶

Generally, joint custody statutes lack specific standards or criteria upon which the court can look for guidance in making custody determinations.⁷ However, Florida's statute sets forth a non-exclusive list of specific factors for the court's consideration and evaluation.⁸

A conceptual analysis of shared responsibility is the focus of this note. A historical prospective of case law in Florida will highlight the reasons for the significant changes in the newly enacted statute. The legislature's textual changes will be discussed, in addition to a consideration of the potential ramifications of the changes mandated. Based on this analysis, recommendations are offered to facilitate the incorporation of shared responsibility into the area of child custody in Florida.

II. The Evolution of Florida Statutes Section 61.13

The 1967 amendment of Florida Statutes section 61.13 dealt with, as does the present statute, the court's power in determining custody of children in dissolution proceedings:

In any action for divorce and alimony, the court has power at any stage of the action to make such orders about the care, custody and maintenance of the children of the marriage, and what security, if any, is to be given thereof, as from the circumstances of the parties and the nature of the case is equitable.⁹

ing Senate Bill 439 (adopted as FLA. STAT. § 61.13 (1982)): "Under the present law, the judges (the trial judges), could do what this bill provides. I think this bill attempts to generate some extra thinking on the parts of judges to get them thinking more on the lines of sharing parental responsibilities . . . it makes them think a little deeper and rightfully so." *Id.*

6. FLA. STAT. § 61.13(2)(b)1 (1982). The statute states in part: "It is the public policy of this state to assure each minor child frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child-rearing." *Id.*

7. *See, e.g.*, CAL. CIV. CODE § 4600.5 (West Supp. 1982).

8. FLA. STAT. § 61.13(3)(a)-(j) (1982).

9. FLA. STAT. § 61.13 (1967).

This amendment renumbered former Florida Statutes section 65.14 as section 61.13 and substituted the word "equitable" in lieu of "may be fit, equitable and just, and such order touching their custody as their best spiritual as well as other interests may require."¹⁰ Spiritual interests never again receive the attention of the legislature as a factor in determining custody.¹¹

The 1971 amendment¹² provided a substantial rewording of Florida Statutes section 61.13. The prior text of section 61.13 became subsection (3). In subsection (2), the legislature codified the best interests of the child test¹³ and gave the father equal standing with the mother in regard to custody.¹⁴ Although the legislature had not yet enumerated the relevant factors¹⁵ to be considered in determining the best interests of the child, courts, while exercising their discretion in deciding custody, continued to articulate factors they considered important.¹⁶ Some

10. FLA. STAT. § 65.14 (1965).

11. Florida Statutes section 61.13(3) (1982) has two sub-sections under which a court may include "spiritual interests" in determining custody: "(f) The moral fitness of the parents" or "(j) Any other factor considered by the court to be relevant to a particular child custody dispute." *Id.*

12. FLA. STAT. § 61.13 (1971).

13. Florida Statutes section 61.13(2) (1971) read in part: "The court shall award custody and visitation rights of minor children of the parties as a part of proceeding for dissolution of marriage in accordance with the best interests of the child. . . ." *Id.*

See also infra notes 29-39 and accompanying text.

14. Florida Statutes section 61.13(2) (1971) read in part: "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody." *Id.* *See also infra* notes 50-65 and accompanying text. *But see* Anderson v. Anderson, 309 So. 2d 1 (Fla. 1975), in which the Supreme Court of Florida announced this statutory mandate of equal consideration was not inconsistent with the tender years presumption in favor of the mother. It was still the case law in Florida that "other essential factors being equal, the mother of the infant of tender years should receive prime consideration for custody." Dinkel v. Dinkel, 322 So. 2d 22, 24 (Fla. 1975).

15. FLA. STAT. § 61.13 (1971).

16. *See, e.g.,* Goldstein v. Goldstein, 264 So. 2d 49 (Fla. 3d Dist. Ct. App. 1972) (preference of the mature child); Peterseil v. Peterseil, 307 So. 2d 498 (Fla. 3d Dist. Ct. App. 1975) (tender years); Jacobs v. Ross, 304 So. 2d 542 (Fla. 3d Dist. Ct. App. 1974) (stable environment); Anderson v. Anderson, 309 So. 2d 1 (Fla. 1975) (remaining in the marital home); Hosking v. Hosking, 318 So. 2d 559 (Fla. 2d Dist. Ct. App. 1975) (social investigator's report); Silvestri v. Silvestri, 309 So. 2d 29 (Fla. 3d Dist. Ct. App. 1975) (prior infidelity not a binding factor).

of these factors were codified in 1975¹⁷ to define the best interests of the child for the purpose of determining the custody of children following a dissolution of marriage.¹⁸

In the last major amendment prior to the 1982 revisions, the legislature, in 1978, authorized courts in dissolution proceedings to award visitation rights to grandparents of a minor child.¹⁹ Not until the 1982

17. FLA. STAT. § 61.13(3) (1975).

18. Florida Statutes section 61.13 (1975) stated in part:

(3) For purposes of custody, the best interests of the child shall be determined by the court's consideration and evaluation of all factors affecting the best welfare and interests of the child including but not limited to the following:

(a) The love, affection, and other emotional ties existing between the parents and the child.

(b) The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the educating of the child.

(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the parents.

(g) The mental and physical health of the parents.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) Any other factor considered by the court to be relevant to a particular custody dispute.

Id.

19. Florida Statutes section 61.13(2)(b) (1978) stated:

The court may award the grandparents visitation rights of a minor child if it is deemed by the court to be in the child's best interest. Nothing in this section shall be construed to require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor shall such grandparents have legal standing as "contestants" as defined in § 61.1306, Florida Statutes. No court shall order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation for the grandparents.

amendment, though, were grandparents awarded "legal standing to seek judicial enforcement of such an award."²⁰

III. Historical Perspective: Florida Case Law Development

A. Scope of the Problem

Prior to a dissolution of marriage, both parents are considered joint natural guardians of their minor children.²¹ They have joint and equal rights of custody, care and control.²² Upon dissolution,²³ the court, with the judge acting in his traditional role of *parens patriae*,²⁴ determines the division of those jointly held parental rights and obligations.²⁵ Because of the dramatic increase in divorce,²⁶ courts are increasingly called upon to make difficult decisions regarding child custody;²⁷ an incorrect determination can have a devastating effect upon

Id.

But see, e.g., Putnal v. Putnal, 392 So. 2d 613 (Fla. 5th Dist. Ct. App. 1981) (Grandparents allowed to participate in postdissolution custody proceedings initiated by the father).

20. FLA. STAT. § 61.13(2)(b)2.c. (1982).

21. FLA. STAT. § 744.301(1) (1972).

22. Florida Statutes section 744.03(1) (1972) stated in part: "A guardian is one to whom the law has entrusted the custody and control of the person or of the property, or of both, of an incompetent." *Id.*

23. *See supra* note 4 for the text of Florida Statutes section 744.301(1) (1972).

24. Under the *parens patriae* doctrine the judge puts himself in the position of a "wise, affectionate and careful parent," and makes his determination concerning the child accordingly. This description appears in *Finlay v. Finlay*, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

25. A list of parental rights and obligations appears in Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523, 537-38 (1979). *See also* *Frazier v. Frazier*, 109 Fla. 164, 166, 147 So. 464, 466 (1933).

26. *See, e.g., Note, Joint Custody: A Revolution in Child Custody Law?*, 20 WASHBURN L.J. 326 (1981).

27. Child custody disputes are all too often tragic theatre. The parties experience all the agonies of characters from a Greek drama. This, in itself, should give us cause to shudder; but there is more to the situation. A judge who must decide these disputes and attorneys who must counsel and advocate are all too frequently oracles without a hint of what to do. They are often overwhelmed by what is asked of them. Prevailing law requires that they focus on the "best interests of the child," but they are often ill-

the child.²⁸ In making these difficult decisions, courts through the years have employed a variety of methods to ensure a proper placement of the child.

B. Best Interests of the Child Test

The best interests of the child test²⁹ focuses on the child's interests as the primary consideration.³⁰ As early as 1913, the Supreme Court of Florida enunciated the principles of the test in review of a custody award.³¹ The court emphasized a need to examine the fitness and condition of the parents in order to make a determination of what was best for the welfare of the child.³² The court's discretion³³ was and contin-

equipped to do so. There is very little in the attorney's education and experience that prepares him to deal with such a delicate human matter; the same is true of the judge.

Batt, *Child Custody Disputes: A Developmental - Psychological Approach to Proof and Decisionmaking*, 12 WILLIAMETTE L.J. 491 (1976).

See also *Brust v. Brust*, 266 So. 2d 400, 402 (Fla. 1st Dist. Ct. App. 1972).

28. Note, *supra* note 26, at 327; Note, *Joint Custody: An Alternative for Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1092-93 (1979).

29. In *Chapsky v. Wood*, 26 Kan. 650 (1881) the Kansas Supreme Court focused on the welfare of the child, not the natural right of the father. Custody was awarded to the maternal aunt who had raised the child from infancy, making this case one of the earliest examples using the best interests of the child test.

30. In *Finlay v. Finlay*, 240 N.Y. 249, 148 N.E. 624 (1925), Judge Cardozo (quoting *Queen v. Gyngall*, 2 Q.B. Div. 232 (1893)) formulated the standard:

[The Judge] does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

240 N.Y. at 433-34, 148 N.E. 624, 626.

31. *Harris v. Harris*, 65 Fla. 50, 61 So. 122 (1913) (custody of minor son awarded to the mother).

32. *Id.*

If the character of either the father, . . . or the mother, . . . of said minor child, shall become disreputable and unfit to have the care, custody, or

ues to be broad in this area which reflects the gravity of a custody decision.³⁴

The Florida Supreme Court in *Green v. Green*³⁵ reiterated the controlling principle of the best interests of the child test: "We are committed to the doctrine that the welfare of the child is the principal feature in determining custody, and that a very large discretion is allowed the chancellor in this respect."³⁶

The best interests of the child test remained a vague standard³⁷ and a general approach³⁸ to Florida custody decisions until the legislature enumerated the factors for determining best interests in 1975.³⁹ Prior to 1975, criteria courts eluded to included: (1) which parent could provide emotional, social, and spiritual guidance;⁴⁰ (2) a wholesome moral atmosphere and suitable educational facilities;⁴¹ (3) stabil-

control of said child, or if their treatment of said child becomes other than parental, then they shall forfeit or lose all their rights, powers and privileges granted in this decree, and said rights, powers and privileges herefore belonging to said party shall revert to the other.

Id. at 50, 61 So. at 122.

33. Note, *supra* note 26, at 329.

This test, [referring to the best interests test], presupposes that it will be best for the child. This supposition forces a judge "to evaluate and choose between highly speculative and sharply conflicting 'expert' testimony regarding the personalities of the contestants and the predicted outcomes of various custody alternatives." The judge brings to the decision his personal opinions and feelings.

Id.

34. *Frazier v. Frazier*, 109 Fla. 164, 166, 147 So. 464, 466 (Fla. 1933). The court in *Frazier* noted that this discretion is subject to judicial review.

35. 137 Fla. 359, 188 So. 355 (1939) (custody of five year old daughter awarded to mother).

36. *Id.* at 360, 188 So. at 356.

37. Note, *Joint Custody: An Alternative for Divorced Parents*, *supra* note 28, at 1086: "The use of such a vague standard enables judges to rely on the mandates of their own consciences."

38. Folberg & Graham, *supra* note 25, at 532.

39. FLA. STAT. § 61.13(3) (1975).

40. *Anderson v. Anderson*, 309 So. 2d 1, 4 (Fla. 1975) (custody of two and one-half year old twin girls awarded to the father).

41. *Baxter v. Baxter*, 158 Fla. 886, 888, 30 So. 2d 492, 494 (1947) (custody of three year old son awarded to the father).

ity and discipline;⁴² and (4) the advantage of the child remaining in the same neighborhood and association with a peer group conducive to the child's well-being.⁴³ Fitness of the mother⁴⁴ and father⁴⁵ were examined, and in rare instances when neither parent was considered fit, custody was awarded to a non-parent.⁴⁶ Alternative forms of custody were also examined, for example, split custody or divided custody.⁴⁷

The best interests of the child test continued to be the paramount consideration for awarding custody after 1975,⁴⁸ and should remain so with the court's discretion intact under the newly enacted statute.⁴⁹

42. *Philips v. Philips*, 153 Fla. 133, 134, 13 So. 2d 922, 923 (1943) (custody of 17 month old son awarded to the father).

43. *Peterseil v. Peterseil*, 307 So. 2d 498, 499 (Fla. 3d Dist. Ct. App. 1975) (custody of boys ages four and six awarded to the mother).

44. *Teel v. Sapp*, 53 So. 2d 635 (Fla. 1951) (mother morally unfit). *But see* *Norris v. Norris*, 202 So. 2d 899 (Fla. 2d Dist. Ct. App. 1967) (mother retained custody despite entertaining "nocturnal friends").

See also *Green v. Green*, 137 Fla. 359, 188 So. 355 (1939) (mother who devoted considerable time to child's supervision and training).

45. *See, e.g., Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975):

Even if the trier of fact determines that the spouse's adultery has an adverse effect on the child, other factors, ie. cruelty, neglect, parental unfitness, exhibited by the other spouse, may be present to tip the scales back in favor of the award of custody to the adulterous spouse. In the latter event, it may be that the best interest of the child would be served by awarding custody to a third party.

Id. at 24.

46. *Id. See, e.g., Cone v. Cone*, 62 So. 2d 907 (Fla. 1953) (en banc) (boy, eleven, and girl, nine, awarded to the grandmother).

47. *See, e.g., Shores v. Shores*, 69 So. 2d 312 (Fla. 1954) (policy of the court to keep the children together - no "split" custody); *Jones v. Jones*, 23 So. 2d 623 (Fla. 1945) (welfare of the children not best promoted by ordering divided custody between the parents).

48. *See, e.g., Rosenberg v. Rosenberg*, 365 So. 2d 185 (Fla. 3d Dist. Ct. App. 1978) (nine year old son awarded to the father who could provide a more stable environment).

49. Florida Statutes section 61.13(3) (1982) states:

For purposes of shared parental responsibility and primary physical residence, the best interests of the child shall be determined by the court's consideration and evaluation of all factors affecting the best welfare and interests of the child, including, but not limited to: (a) . . . to (j) Any other factor considered by the court to be relevant to a particular child custody dispute.

C. Tender Years Doctrine

Early English⁵⁰ and American⁵¹ courts viewed paternal custody as a virtually absolute rule.⁵² Later, however, under the tender years doctrine,⁵³ the mother of a minor child received custody unless it was shown she was not a "fit and proper person" to rear the children.⁵⁴ This became known as the "Other Things Being Equal Rule" in Florida,⁵⁵ meaning that presented with two equally fit parents requesting custody of a young child, courts would elect the mother.

When custody of a young child was awarded to the father, the welfare of the child under the best interests of the child test superceded the doctrine⁵⁶ or the "other factors" were not found to be equal as between the parents.⁵⁷ Employment of the tender years doctrine meant

Id.

50. See, e.g., *The King v. DeManneville*, 102 Eng. Rep. 1054 (1804) (custody of infant awarded to father).

51. See, e.g., *Carr v. Carr*, 63 Va. (22 Gratt.) 168 (1872) (custody of three year old child awarded to father).

52. The shift to favoring the mother began with Justice Talfourd's Act, 2 & 3 Vict., ch. 54 (1839). Custody could be awarded to the mother if the children were less than seven years old. This Act is the origin of the "Tender Years Doctrine" in England. Note, *supra* note 26, at 328.

53. *Helms v. Fransiscus*, 2 Bland's Ch. 544 (Md. 1830), *quoted in* Note, *supra* note 26, at 328, provides what is considered the first American expression of the tender years doctrine:

[Even] a court of common law will not go so far as to hold nature in contempt and snatch helpless, pulling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest and safest nurse in infancy, and with her it will be left in opposition to this general right of the father.

Id. at 563.

54. *Jones v. Jones*, 156 Fla. 524, 526, 23 So. 2d 623, 625 (Fla. 1945) (boy, six, and girl, four, awarded to mother).

55. *Fields v. Fields*, 143 Fla. 886, 197 So. 153 (1940) (three children, ages three, five and seven, awarded to mother): "Other things being equal . . . the mother of infants of tender years is best fitted to bestow the motherly affection, care, companionship, and early training suited to their needs." *Id.* at 887, 197 So. at 154.

56. *Philips v. Philips*, 153 Fla. 133, 13 So. 2d 922 (Fla. 1943) (custody of 17 month old son awarded to father).

57. See, e.g., *Brust v. Brust*, 266 So. 2d 400, 401-02 (Fla. 1972) (custody to father of sons six, eight and ten).

"the pendulum of custody has swung from father to mother and has finally centered upon the principal question of the welfare of the child."⁵⁸

After the 1971 Amendment to Florida Statutes section 61.13(2),⁵⁹ the Florida Supreme Court reaffirmed the principles of the tender years doctrine despite the statutory mandate of equal consideration for both the mother and father in custody disputes.⁶⁰ Despite the statute's express statement, it was still the case law in Florida that "other essential factors being equal, the mother of the infant of tender years should receive prime consideration for custody."⁶¹

However, in 1975, the legislature amended Florida Statutes section 61.13(3)⁶² to include criteria to be considered when determining the welfare and best interests of the child. Courts then began use of those factors to apply "equal consideration."⁶³ The 1982 amendment to Florida Statutes section 61.13 states: "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody *regardless of the age of the child*."⁶⁴ Thus, the Florida legislature has expressly eviscerated the historical and judicially followed tender years doctrine.⁶⁵

58. *Id.* at 402.

59. *See supra* note 14 for the text of Florida Statutes section 61.13(2) (1971).

60. *Anderson v. Anderson*, 309 So. 2d 1, 2 (Fla. 1975).

61. *Dinkel v. Dinkel*, 322 So. 2d 22, 24 (Fla. 1975). *See also Corvison v. Corvison*, 362 So. 2d 323 (Fla. 3d Dist. Ct. App. 1978) (custody of six year old and three year old awarded to mother). *But see Snedaker v. Snedaker*, 327 So. 2d 72 (Fla. 1st Dist. Ct. App. 1976) (custody of three year old awarded to father):

When, as here, there is a dearth of evidence in support of the position of the mother, as opposed to overwhelming evidence indicating that it is for the best interests of the child for its custody to be awarded to its father, any 'presumption', 'prime consideration', or 'natural edge', abiding with the mother is overcome and custody should be awarded to that parent in whose custody the best interests of the child will be served, in the light of the evidence adduced.

Id. at 73.

62. FLA. STAT. § 61.13 (1975).

63. *Kerschner v. Crocker*, 400 So. 2d 126, 127 (Fla. 5th Dist. Ct. App. 1981) (custody of five year old daughter awarded to the father).

64. FLA. STAT. § 61.13(2)(b)1. (1982) (emphasis added).

65. Two open questions remain:

a) Since the 1982 amendment excludes the "sex" of the child as a factor for equal

D. Modification of Custody

Modification of custody, whether originally determined by an agreement between the parties⁶⁶ or by court decree,⁶⁷ traditionally has been the "proper subject for judicial consideration at any time by the court which granted the decree of divorce."⁶⁸ Since the award of custody is regarded as *res judicata*⁶⁹ as of the time of the decree, the court does not have the same degree of discretion to choose between the parents seeking modification as it did upon the initial custody determination.⁷⁰

To warrant modification of a child custody decree, changed circumstances is the threshold requirement.⁷¹ In order to warrant up-

consideration in its text of § 61.13(2)(b)1., will a mother still have the "natural edge" to be awarded a daughter? *See, e.g., Silvestri v. Silvestri*, 309 So. 2d 29 (Fla. 3d Dist. Ct. App. 1975).

b) Since most custody arrangements are by agreement, will the mother still continue to be given "prime consideration" anyway by those unaware of the new statutory mandate: "Even though the tender years doctrine is waning, its effects are still present. In about 90% of custody cases, the mother is awarded sole custody, and the mother assumes sole custody in at least 90% of the cases that never reach the court." Note, *supra* note 26, at 328.

66. *See, e.g., Forte v. Forte*, 320 So. 2d 446 (Fla. 3d Dist. Ct. App. 1975): "Interpretation or modification of a separate agreement affecting welfare of children is not only permissible, but obligatory where the circumstances so indicate." *Id.* at 448.

67. *See, e.g., Cone v. Cone*, 62 So. 2d 907 (Fla. 1963) (en banc): "So long, then, as the minor child is within the jurisdiction of the equity court, such court may exercise its continuing jurisdiction to modify its decree as to the custody of the child, even though jurisdiction was not expressly retained therein." *Id.* at 908.

68. *Frazier v. Frazier*, 109 Fla. 164, 165, 147 So. 2d 464, 465 (1933), *reh'g denied*, April 19, 1933; *Green v. Green*, 307 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1975).

69. *But see, Taylor v. Schilt*, 292 So. 2d 47 (Fla. 2d Dist. Ct. App. 1974): "Res judicata does not fit in custody matters, yet some barrier must be raised against too frequent petitions for modification." *Id.* at 49.

70. *Green v. Green*, 307 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1975).

Courts are reluctant to disrupt a child's environment unless the circumstances clearly call for it. Arguably, therefore, a clear advantage goes to the parent who wins the initial custody determination, even if it is only a temporary custody determination until the actual dissolution proceedings.

71. *Taylor v. Schilt*, 292 So. 2d 47, 49 (Fla. 2d Dist. Ct. App. 1974); *Philips v. Philips*, 13 So. 2d 922, 923 (Fla. 1943). *See also, Frazier*, 109 Fla. 164, 147 So. 2d at 464.

rooting the child, there must be competent, substantial evidence that (1) there has been a substantial or material change in the conditions of the parties *and* (2) that the best interests and welfare of the child will be promoted by the change of custody.⁷² Although a heavy burden is placed upon the parent seeking modification,⁷³ it can be justified by the protection of the child from disruption caused by too frequent modification petitions.⁷⁴

Factors considered in making a determination of change of custody have included, but are not limited to: (1) preference of a mature child,⁷⁵ (2) psychological evaluation,⁷⁶ (3) stability of the living environment,⁷⁷ (4) sexual activity and cohabitation of the custodial par-

[The final decree] is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the court, and then only for the welfare of the child.

Frazier, 109 Fla. at 164-65, 147 So. 2d at 464-65.

72. *Sanders v. Sanders*, 376 So. 2d 881, 882 (Fla. 1st Dist. Ct. App. 1980). *See also*, *Bennett v. Bennett*, 73 So. 2d 274 (Fla. 1954); *Jones v. Jones*, 156 Fla. 524, 23 So. 2d 623 (1945); *Brush v. Brush*, 414 So. 2d 37 (Fla. 3d Dist. Ct. App. 1982); *Adams v. Adams*, 385 So. 2d 688 (Fla. 3d Dist. Ct. App. 1980); *Jacobs v. Ross*, 304 So. 2d 542 (Fla. 3d Dist. Ct. App. 1974). *But see*, *Goodman v. Goodman*, 291 So. 2d 106 (Fla. 3d Dist. Ct. App. 1974) (discussing *Hutchins v. Hutchins*, 220 So. 2d 438, 439 (Fla. 4th Dist. Ct. App. 1969)):

The Fourth District Court in *Hutchins* did state that in modification of child custody cases a showing must be made "not only that the general welfare of the children will be served by a change of custody, but that it will be detrimental to the children if custody is not changed."

Goodman, 291 So. 2d at 108.

73. *See, e.g.*, *Stricklin v. Stricklin*, 383 So. 2d 1183 (Fla. 5th Dist. Ct. App. 1980); *McGregor v. McGregor*, 7 Fla. Law Weekly 1656 (Fla. 5th Dist. Ct. App. Aug. 4, 1982) (No. 81-568).

74. *Taylor v. Schilt*, 292 So. 2d 47, 49 (Fla. 2d Dist. Ct. App. 1974). *But see*, *Prevatt v. Penney*, 138 So. 2d 537 (Fla. 2d Dist. Ct. App. 1962): "Custody of the child has been a continuing series of rounds characterized by animosity, charges and countercharges." *Id.* at 539.

75. *Goldstein v. Goldstein*, 264 So. 2d 49 (Fla. 3d Dist. Ct. App. 1972).

76. *Garvey v. Garvey*, 383 So. 2d 1172, 1173 (Fla. 2d Dist. Ct. App. 1980). *But see* the dissent in *Green v. Green*, 307 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1975) criticizing the use of counselor's investigation as a factor in determining custody.

77. *Rosenberg v. Rosenberg*, 365 So. 2d 185, 186 (Fla. 3d Dist. Ct. App. 1978), *reh'g denied*, January 3, 1979.

ent,⁷⁸ and (5) changed needs of an older child.⁷⁹ Remarriage of a non-custodial parent, as well as increased material wealth and acquisition of a suitable home have not been found sufficient in and of themselves to fulfill the requirement of changed circumstances.⁸⁰ Finally, it is the trend in Florida that a custodial parent need not be proven unfit to have any factors in "changed circumstances" considered in a modification petition.⁸¹

The majority of past petitions for change of custody requested a transfer from sole custody in one parent to sole custody in another.⁸² In cases in which the non-custodial parent requested split or divided custody,⁸³ the burden and factors used by the court remained the same.⁸⁴

The newly enacted statute mandates shared responsibility as part of any proceeding under the chapter⁸⁵ unless the court finds that shared parental responsibility would be detrimental to the child's best interest.⁸⁶ It remains an open question whether the court will continue to follow the prior enumerated standards in a modification petition.⁸⁷

78. *Smothers v. Smothers*, 281 So. 2d 359 (Fla. 1973); *Young v. Young*, 305 So. 2d 92 (Fla. 1st Dist. Ct. App. 1974).

79. *McGregor v. McGregor*, 7 Fla. Law Weekly 1656 (Fla. 5th Dist. Ct. App. Aug. 4, 1982) (No. 81-568).

80. *Adams v. Adams*, 385 So. 2d 688, 689 (Fla. 3d Dist. Ct. App. 1980); *Stricklin v. Stricklin*, 383 So. 2d 1183 (Fla. 5th Dist. Ct. App. 1980). *But see*, *Hoffman v. Linley*, 201 So. 2d 641 (Fla. 3d Dist. Ct. App. 1967) (mother was original custodian, lost custody upon a finding of unfitness, and finally upon re-petition after remarriage was again awarded custody).

81. *Goodman v. Goodman*, 291 So. 2d 106, 108 (Fla. 3d Dist. Ct. App. 1974); *Taylor v. Schilt*, 292 So. 2d 47, 49 (Fla. 1st Dist. Ct. App. 1974).

82. *See supra* note 72.

83. *See infra* notes 98-114 and accompanying text.

84. *See, e.g.*, *Jacobs v. Ross*, 304 So. 2d 542, 543 (Fla. 3d Dist. Ct. App. 1974).

85. 1982 FLA. LAWS ch. 82-96 (amending § 61.13(2)(b)3. (1982)).

86. FLA. STAT. § 61.13(2)(b)2. (1982).

87. Two additional open questions remain:

a) Will courts now entertain modification petitions of once "boiler-plate" sole custody agreements, thereby flooding the courts?

b) Is the newly enacted Florida Statutes section 61.13 (1982) alone enough of a changed circumstance to reach the threshold requirement for a modification petition?

E. Grandparent Visitation Rights

Historically in Florida, grandparents were treated as any other non-parents and were denied visitation rights.⁸⁸ Courts recognized the emotional bonds between the grandparents and grandchildren, yet found visitation rights were unjustified and unenforceable.⁸⁹ Until 1978, when legislation⁹⁰ was passed permitting an award of visitation if it was in the child's best interests, visitation rights of grandparents were always struck down by courts.⁹¹

88. In *Parker v. Gates*, 89 Fla. 76, 103 So. 126 (1925), the Supreme Court refused visitation rights to a non-parent who had raised a nine year old child for most of his life. The court enunciated the principle cited numerous to deny grandparents and non-parents visitation rights: "[t]he order . . . cannot legally be enforced against the wishes of the child's mother." *Id.* at 76, 103 So. at 126.

89. See, e.g., *Lee v. Kepler*, 197 So. 2d 570 (Fla. 3d Dist. Ct. App. 1967):

This decision . . . need not operate to prevent the maternal grandmother from seeing the child, for whom she has shown great interest and affection, nor deprive the child of the benefit and pleasure to be derived therefrom . . . (but) the father and his wife — he as a natural parent and she as a parent by adoption are entitled to determine the frequency, time and the place of visitation with the child. . . ."

Id. at 573.

See also *Rodriguez v. Rodriguez*, 295 So. 2d 328 (Fla. 3d Dist. Ct. App. 1974); *Sheehy v. Sheehy*, 325 So. 2d 12 (Fla. 2d Dist. Ct. App. 1975); *Tamargo v. Tamargo*, 348 So. 2d 1163 (Fla. 2d Dist. Ct. App. 1977). In all cases, custody was had by *fit* parents. But see *Behn v. Tummons*, 345 So. 2d 388 (Fla. 1st Dist. Ct. App. 1977), which recognized the authority of the trial court to award custody to grandparents and non-parents limited to cases in which either or the parents are *unfit* to raise the child.

90. Florida Statutes section 61.13(2)(b) (1978) read in part:

The court may award the grandparents visitation rights of a minor child if it is deemed by the court to be in the child's best interest. Nothing in this section shall be construed to require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor shall such grandparents have legal standing as "contestants" as defined in § 61.1306, Florida Statutes. No court shall order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation for the grandparents.

Id.

See also Florida Statutes section 61.1306(1) (1977) which defines, "contestant" as follows: "(1) 'Contestant' means a person, including a parent, who claims a right to custody or visitation rights with respect to a child."

91. See *supra* note 89.

Since the grandparents could now only be heard in the context of a divorce or custody proceeding,⁹² this lack of standing as contestants⁹³ to maintain an independent civil action to achieve visitation rights, effectively continued to cause denial of those rights.⁹⁴

Florida Statutes section 61.13(2)(c)⁹⁵ now provides that necessary legal standing and should therefore fulfill the legislature's intent to provide for the best interests of the child.⁹⁶ It remains to be seen whether the legislature shall follow the trend begun to extend visitation rights to non-parents, other relatives of the child.⁹⁷

92. See *supra* note 90.

93. See *supra* note 90.

94. *Osteryoung v. Leibowitz*, 371 So. 2d 1068 (Fla. 3d Dist. Ct. App. 1979), *reh'g denied*, July 5, 1979; *Shuler v. Shuler*, 371 So. 2d 588 (Fla. 1st Dist. Ct. App. 1979). *But see Whitehead v. Hewett*, 380 So. 2d 492 (Fla. 1st Dist. Ct. App. 1980), *reh'g denied*, March 18, 1980 (award of visitation rights to grandparents held not an abuse of discretion as grandparents were legal custodians under a prior order and modification proceedings were instituted by the child's father); *Putnal v. Putnal*, 392 So. 2d 613 (Fla. 5th Dist. Ct. App. 1981) (court concluded that in entertaining a joint motion allowing grandparents participation in a proceeding initiated by the father, in which he and another couple were contestants, the trial court did not err. It added the trial court would have erred had it refused to allow the grandparents to participate).

Against all prior precedent and without a statutory basis (as grandparents then had), a non-parent was granted visitation rights on the basis of the child's best interests. See *Wills v. Wills*, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981), in which the court in a dissolution proceeding granted a step-mother visitation rights with her husband's adopted daughter.

95. 1982 FLA. LAWS ch. 82-96 (effective July, 1982).

96. Florida Statutes section 61.13(2)(c) (1982) states in part: "The court may award the grandparents visitation rights of a minor child if it is deemed by the court to be in the child's best interest. Grandparents shall have legal standing to seek judicial enforcement of such an award."

See also 7 FAM. L. REP., *Trends In Grandparent Third-Party Visitation Rights Legislation*, July 21, 1981, at 2587:

As the nation's divorce rate has climbed, the issue of grandparents' visitation rights has grown in importance. Out of concern for maintaining a family relationship that can provide emotional security for the children of divorced parents, most states over the last decade have considered legislation to establish procedures by which grandparents and other family members can petition for visitation rights.

Id. at 2587.

97. Other relatives may include "great-grandparents, stepparents, half-brothers and half-sisters." *Trends In Grandparent Third-Party Visitation Rights Legislation*,

F. Alternative Forms of Custody

While the norm in Florida has been to grant sole custody to the mother,⁹⁸ courts, upon considering individual circumstances, have also awarded sole custody to the father.⁹⁹ The best interests of the child test has been the basis for the courts to order "divided" custody, "rotating or alternating" custody.¹⁰⁰ The various terms are used interchangeably and inexactly in courts in Florida.¹⁰¹ Case law in Florida has dealt almost exclusively with forms of "divided" custody, where one parent is still the sole custodian over a distinct period of time.

The Florida Supreme Court in 1933,¹⁰² recognized a father must be afforded an opportunity to exercise his paternal rights¹⁰³ and be-

supra note 96, at 2587.

98. *See, e.g.*, *Shores v. Shores*, 60 So. 2d 313 (Fla. 1954); *Teel v. Sapp*, 53 So. 2d 635 (Fla. 1951).

99. *See, e.g.*, *Jobe v. Jobe*, 202 So. 2d 791 (Fla. 1st Dist. Ct. App. 1967); *Klein v. Klein*, 204 So. 2d 239 (Fla. 3d Dist. Ct. App. 1967), *reh'g denied*, December 12, 1967.

100. These terms need to be distinguished from each other. Divided (or alternating or rotating) custody is when each parent has sole custody of the child for a distinct portion of the year. The parent in whose home the child resides has sole legal authority (care, custody and control) during that period. Of course, the other parent has visitation rights. Split custody refers to "the situation where custody of one or more children is awarded to one parent and the remaining children to the other parent." *Gerscovich v. Gerscovich*, 406 So. 2d 1150, 1151-53 (Fla. 5th Dist. Ct. App. 1981).

Joint custody "leaves the parental rights and obligations toward the child the same as existed during the marriage . . . both parents have equal authority and responsibility for all facets of raising the child . . . the child's upbringing is a cooperative project; both parents agree on the important decisions concerning the child's life. . . . Joint custody entails the division of physical custody at relatively brief intervals, with the child's time roughly divided equally between the parents and spread evenly throughout the year." Note, *Joint Custody: An Alternative for Divorced Parents*, *supra* note 28, at 1104-05.

101. *Gerscovich v. Gerscovich*, 406 So. 2d 1150, 1151 (Fla. 5th Dist. Ct. App. 1981).

102. In *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (1933) both parents were, under the divorce decree, afforded six months each with the eleven year old daughter. The modification order only allowed the father two weeks visitation.

103. The father is not only entitled to have "leave" for the child to visit him for two weeks each year, but is entitled to have and enjoy her society for a reasonably sufficient length of time each year to enable him to inculcate in her mind a spirit of love, affection, and respect for her father. . . .

cause neither parent was considered a “good example of conduct or character,”¹⁰⁴ the court approved a divided custody plan.¹⁰⁵ Ten years later the Supreme Court¹⁰⁶ made an about face and took a definitive stand *against* divided custody:

There can be no doubt that experience shows that it is detrimental to the best interests of a young child to have its custody and control shifted often from one household to another and to be changed often from the discipline and teachings which are attempted to be imparted by one custodian to that other discipline and teachings sought to be imparted by another custodian. . . . It has been written on the pages of all time that no man can serve two masters and it is certainly true that no child can pursue a normal life when subjected to the precepts, example and control of first one person and then another, regardless of how well intentioned those persons may be.¹⁰⁷

In another vacillation later that same year, the Florida Supreme Court approved a divided custody award because both parents “*were* of highly respectable character.”¹⁰⁸

On the whole, the case law presumption in Florida against divided custody was reaffirmed numerous times by the Supreme Court¹⁰⁹ and

Parental rights of the father growing out of the father’s legal responsibility, as well as recognized moral obligation, to maintain and care for both the mother and their children, when other considerations do not materially preponderate against it in the interest of the welfare of children must be accorded due consideration by a court in making an order, as to the custody of children heretofore enjoyed by the father.

Id. at 167, 147 So. at 467.

104. *Id.* at 167, 147 So. at 467.

105. *Id.* The daughter would spend nine months with the mother and three months with the father.

106. *Phillips v. Phillips*, 153 Fla. 133, 13 So. 2d 922 (Fla. 1943).

107. *Id.* at 134, 13 So. 2d at 923.

108. *Watson v. Watson*, 153 Fla. 668, 669, 15 So. 2d 446, 447 (1943) (emphasis added). The children would spend six months with the mother and six months with the father. A major factor was the fact both parents worked. The court stated: “This case is typical of many that have from time to time changed the current of some phase of the law;” the mother’s working caused her to lose her preferential standing. *Id.*

109. *Hurst v. Hurst*, 158 Fla. 43, 27 So. 2d 749 (1946) (en banc) (tender years doctrine used to invalidate divided custody), *reh’g denied*, Nov. 19, 1946; *Jones v.*

the district courts of appeal.¹¹⁰ Despite this reaffirmation, courts *did* express approval of divided custody in certain situations having "special circumstances or legally unequal facts."¹¹¹ Thus divided custody was not absolutely prohibited, and various forms were awarded by the courts.¹¹² The test seemed to be a weighing of factors including the desire of the parties to have divided custody, the proximity of custodial domiciles, the reasonableness of the periods of divided custody, the ages and preference of the children, and, especially, the specific circumstances of each case.¹¹³

Jones, 156 Fla. 524, 23 So. 2d 623 (1945).

110. *Bienvenu v. Bienvenu*, 380 So. 2d 1164 (Fla. 3d Dist. Ct. App. 1980) (not in best interests of child due to mutual antagonism between the parents); *Garvey v. Garvey*, 383 So. 2d 1172 (Fla. 2d Dist. Ct. App. 1980) ("joint" custody order reversed based on psychologist's report); *Peterseil v. Peterseil*, 307 So. 2d 498 (Fla. 3d Dist. Ct. App. 1975); *Unger v. Unger*, 306 So. 2d 540 (Fla. 3d Dist. Ct. App. 1975); *Ritzi v. Ritzi*, 160 So. 2d 159 (Fla. 3d Dist. Ct. App. 1964); *Rudolph v. Rudolph*, 146 So. 2d 397 (Fla. 3d Dist. Ct. App. 1962) (best interests of child used to invalidate divided custody).

111. *Wonsetler*, 240 So. 2d at 871.

112. *Gerscovich v. Gerscovich*, 406 So. 2d 1150 (Fla. 5th Dist. Ct. App. 1981) (parents to alternate custody of eleven year old girl and fifteen year old boy on a yearly basis), *as clarified*, Dec. 7, 1981; *Forman v. Forman*, 315 So. 2d 9 (Fla. 3d Dist. Ct. App. 1975) (mother to share joint custody of minor son with maternal grandparents), *reh'g denied*, July 22, 1975; *Hare v. Potter*, 233 So. 2d 653 (Fla. 4th Dist. Ct. App. 1970) (remanded to determine periods of custody), *reh'g denied*, Apr. 30, 1970; *Lindgren v. Lindgren*, 220 So. 2d 440 (Fla. 2d Dist. Ct. App. 1969) (mother and father alternate custody four days one week and three days the next week of twin daughters); *Bolton v. Gordon*, 201 So. 2d 744 (Fla. 4th Dist. Ct. App. 1967) (mother awarded custody nine months to coincide with school year and father to have custody during the three summer months); *Udell v. Udell*, 151 So. 2d 663 (Fla. 2d Dist. Ct. App. 1963) (joint custody awarded to both parents of thirteen year old and the court would "provide definite periods of time that each parent should have custody of this child if they could not agree among themselves as to the hours of custody, etc." *Id.* at 865); *Hutchinson v. Hutchinson*, 127 So. 2d 136 (Fla. 3d Dist. Ct. App. 1961) (father awarded custody during school term and mother awarded custody during summer vacation); *Metz v. Metz*, 108 So. 2d 512 (Fla. 3d Dist. Ct. App. 1959) (father allowed to have daughter with him in his home outside state during part of the summer vacation), *reh'g denied*, Feb. 16, 1959.

See also, *Brown v. Brown*, 7 Fla. Law Weekly (Fla. 4th Dist. Ct. App. Nov. 24, 1982) (No. 82-771) (for award of split custody: fourteen year old daughter and sixteen year old son to live with father, and three year old daughter to live with mother).

113. *See, e.g., Gerscovich v. Gerscovich*, 406 So. 2d 1150, 1151-52 (Fla. 5th

Since none of the above alternative forms of custody previously awarded in Florida totally embrace the concept of shared responsibility,¹¹⁴ the courts in Florida will be applying an innovative concept.

IV. The Concept of Shared Parental Responsibility: Florida Statutes Section 61.13¹¹⁵

A. Purposes of the Amendments

The purposes of the 1982 amendments are set forth in Florida Statutes section 61.13. The intent of the legislature is clearly stated: "It is the public policy of this state to assure each minor child frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child-rearing."¹¹⁶ This portion of the statute recognizes the child's right to have access to both parents¹¹⁷ and requires each parent to acknowledge and recognize the other as a full

Dist. Ct. App. 1981). *See also supra* note 103.

114. FLA. STAT. § 61.13(2)(b)2. (1982). It is impossible to determine the number of separation *agreements* between parents in Florida which may have heretofore incorporated this concept as these are not reported.

115. On October 8, 1982, the Florida Bar Continuing Legal Education Committee and Family Law Section presented a lecture program called *The Anatomy of Shared Parental Responsibility*. The speakers will be quoted extensively in this section. Their statements will be reflected in footnotes by citation to their name. They were in order of their presentations:

Honorable Rosemary Barkett, Circuit Judge, 15th Judicial Circuit, West Palm Beach, Florida.

James Fox Miller, Attorney, Hollywood, Florida.

Honorable Frank A. Orlando, Circuit Judge, 17th Judicial Circuit, Fort Lauderdale, Florida.

Melvyn B. Frumkes, Attorney, Miami, Florida.

Honorable Lewis Kapner, Circuit Judge, 15th Judicial Circuit, West Palm Beach, Florida.

A course manual, also entitled ANATOMY OF SHARED PARENTAL RESPONSIBILITY, 1982, was distributed and contained articles by the speakers above, as well as other contributors [hereinafter cited as MANUAL]. A copy of the MANUAL is on file in the Nova Law Review office.

116. 1982 FLA. LAWS ch. 82-96 (effective July 1, 1982).

117. Judge Barkett.

parent and partner in the rearing of the child.¹¹⁸ Implicit in the statute is the recognition of the need to reeducate lawyers, judges,¹¹⁹ parents, and the public in this “emotional field of the law.”¹²⁰ The problems caused by sole custody¹²¹ should be abrogated by the shared parenting aspect of the statute.

Looking to the construction of the language of this section, as well as all the other sections of Florida Statutes section 61.13, it becomes evident that an entirely new vocabulary is now to be incorporated into Florida domestic relations law.¹²² Custody disputes are not suited to the adversary system. Custody is not a vested right or award “fostered by the present system which has awarded the ‘prize’ to the ‘winner’.”¹²³ No longer will “custody be awarded” or “visitation rights” be delineated.¹²⁴

The statute has more depth than just the matter of the above stated semantics — it focuses on the child and who will be responsible for raising the child.¹²⁵ The term “children” in the plural form has been changed to “each [minor] child”¹²⁶ used in the singular form, her-

118. Judge Kapner.

119. “The legislature addressed the concept of shared parental responsibility not because the courts were *making* such awards in inappropriate cases but because some courts *refused* to do so even when clearly warranted.” Kapner, *Shared Parental Responsibility: Is It For Everyone?*, MANUAL, *supra* note 115, at 5.12 (emphasis in original).

120. James Fox Miller.

121. For example, (1) the stigma attached to a mother without custody, (2) that fathers who were just “visitors” acted as such, (3) that mothers who were “custodians” used that power against the fathers, and (4) the custody battles and contempt orders that accompanied the former. Barkett, *From Custody to Shared Parenting - An Overview*, MANUAL, *supra* note 115, at 1.3(a).

122. Judge Barkett.

123. Barkett, *From Custody to Shared Parenting - An Overview*, MANUAL, *supra* note 115, at 1.3(a).

124. Florida Statutes section 61.13(2)(b)1. (1982) states “the court shall determine all matters relating to custody. . . .” The words “award custody and visitation rights” were deleted.

Suggested new terminology includes “access and contact” instead of the word visitation. Melvyn Frumkes.

125. Judge Barkett.

126. Florida Statutes section 61.13(2)(b)1. (1982) states in part: “The court shall determine all matters relating to custody of *each* minor *child* of the parties. . . .”

alding a shift in focus from the needs of the children of a dissolved marriage as an entity to be examined, to a recognition that each child's needs in a family unit be examined separately to provide properly for his welfare.¹²⁷

Since the purpose of the statute is to focus on each individual child rather than rely on generalizations, the statute mandates the end of the tender years doctrine.¹²⁸ In this substantive change, the statute abrogated the judicial presumption that the mother of a child of tender years shall be the designated custodian.¹²⁹

Further reinforcement of the policy of encouraging shared participation in child-rearing can be found in Florida Statutes section 61.13(2)(b)3.¹³⁰ By giving both parents access to all records and information pertaining to a child, this section eliminates the "ownership" aspect of child custody and makes possible effective co-parenting.¹³¹

Finally, by speaking in general terms of rights and responsibilities of the child to be shared by the parents, the legislature, through Flor-

The word "children" was deleted.

127. "Florida courts have routinely held that it is error to divide children between parents. However, it is to be noted that Cha. 82-96 has reworded Section 61.13(2)(b), Florida Statutes, from 'rights of children' to 'custody of each minor child.' Does this subtle change indicate a legislative intent to abrogate the former case law? Your authors take no position and will wait appellate clarification thereof." Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.31.

128. Florida Statutes section 61.13(2)(b)1. (1982) states in part: "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody *regardless of the age of the child.*" (emphasis added).

129. Judge Barkett.

Arguably, even though the legislature has mandated the demise of the tender years doctrine, trial judges may continue to order custody of young children to mothers, supporting it on theories of bonding between the mother and child due to the care and feeding of tiny infants more typically done by the mother than by the father. Even if there were evidence of shared responsibilities, some judges are constitutionally more likely to believe that meaningful nurturing was done by the mother, i.e., if the child was breast fed.

130. Florida Statutes section 61.13(2)(b)3. (1982) states: "Access to records and information pertaining to a minor child, including but not limited to medical, dental and school records, shall not be denied to a parent because such parent is not the child's primary residential parent."

131. Barkett, *From Custody to Shared Parenting - An Overview*, MANUAL, *supra* note 115, at 1.3(b) and in presentation.

ida Statutes section 61.13, "will signal to the public an expressed public policy recognizing that divorcing parents do not divorce their children in the process and that they continue to be jointly responsible for them."¹³²

B. Changes Mandated: The Statute and Its Implementation

1. *Unrestricted Shared Parental Responsibility*¹³³

Florida Statutes section 61.13 creates a statutory presumption in favor of sharing parental responsibility: "The Court *shall* order that parental responsibility for a minor child *shall* be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."¹³⁴ Use of this mandatory language makes clear that a simple custody-visitation arrangement is no longer viable in Florida.¹³⁵

Shared parental responsibility is defined to mean "that both parents retain full parental rights and responsibilities with respect to their child, and requires both parents to *confer* so that *major decisions* affecting the welfare of the child will be determined jointly."¹³⁶ Because the statute specifically separates the areas of "primary physical residence [and] shared parental responsibility,"¹³⁷ this amendment and definition contemplate the concept of joint legal custody rather than the term joint custody itself, which connotes a combination of joint legal and joint physical custody.¹³⁸ The absence of the term "joint custody" in the statute and the use of clearly defined new vocabulary precludes

132. *Id.*

133. This term appears in the MANUAL at page 4.18, adopted from the guidelines prepared by the Family Law Division, 13th Judicial Circuit, Hillsborough County, Florida. Its definition follows the statute stating "both parents retain legal responsibility and authority for the control and care of their child as they did when the family was intact." *Id.*

134. FLA. STAT. § 61.13(2)(b)2. (1982) (emphasis added).

135. Judge Barkett.

136. FLA. STAT. § 61.13(2)(b)2.a. (1982) (emphasis added). It is anticipated the meaning of the emphasized words will be heavily litigated.

137. FLA. STAT. § 61.13(3) (1982).

138. Melvyn Frumkes, Judge Kapner. *See also* Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.5.

any “preconceived connotations of shared parenting or joint custody”¹³⁹ in Florida.

An order for shared parental responsibility may be established by the court or by agreement by the parties,¹⁴⁰ after review of the individual circumstances of each case.¹⁴¹ The best interests of the child remains the primary consideration of the court.¹⁴² Because the parents are in the best position to determine what is best for their own participation in child-rearing, agreements between the parents are encouraged.¹⁴³ Therefore, there is no one “shared parental responsibility” formula and arrangements will vary considerably.¹⁴⁴

Courts consider a number of factors when determining whether shared parenting is appropriate, including: (1) fitness of the parents,¹⁴⁵

139. Barkett, *From Custody to Shared Parenting - An Overview*, MANUAL, *supra* note 115, at 1.3(b).

140. Florida Statutes section 61.13(2)(b)2.a. (1982) states in part: “In ordering shared parental responsibility, the court may consider the *expressed desires* of the parties. . . . Where it appears to the court to be in the best interests of the child, the court may order or the parties may agree. . . .” (emphasis added).

141. Kapner, *Shared Parental Responsibility: Is It For Everyone?*, MANUAL, *supra* note 115, at 5.41. See also pages 5.15 - .16 of the MANUAL quoting judicial attitudes from a survey conducted among Florida Circuit Judges in 1977.

[V]irtually *all* the judges would grant shared parental responsibility, so as defined, if the best interests of the children are served (95%), the parties are agreeable to it (85%), or the children, being of sufficient age and maturity, desire it, and the parties do not object (90%). The most popular physical arrangement was nine months with one parent and three months with the other. Most judges (80%) eschewed a general unspecified order of shared parental responsibility or a six months - six months alternating arrangement, and a slight majority opposed Monday through Thursday with one parent and Friday to Monday with the other. Not surprisingly, the more mature the parents and the better the parent-child relationships, the more likely the judges were to order shared parental responsibility.

Id. at 5.15 - .16.

142. FLA. STAT. § 61.13(2)(b)1. (1982).

143. All the speakers stated this at one point in their discussions.

144. “The truth is that responsibility arrangements are as varied as are the situations and personalities of divorced parents, and more than one arrangement can be fairly described as a ‘true’ shared parental responsibility arrangement.” Kapner, *Shared Parental Responsibility: Is It For Everyone?*, MANUAL, *supra* note 115, at 5.2.

145. *Id.* at 5.23-.24.

(2) positive agreement of the parents,¹⁴⁶ (3) preference of the children,¹⁴⁷ (4) ability and willingness of the parents to cooperate with each other,¹⁴⁸ (5) the particular psychological and emotional needs of the children,¹⁴⁹ (6) the degree to which possible divided residential care would disrupt the child's normal school and schedule,¹⁵⁰ and (7) the age and maturity of the children.¹⁵¹ In the alternative, courts may employ a three prong test which directs the court to consider three essential factors. First, each parent must be individually fit to act as custodian of the child. Second, the parents together must demonstrate an ability to cooperate on matters affecting the child's welfare. The areas in which cooperation is necessary range from practical considerations to agreement on such fundamental issues as education, health care, discipline and religious training. Finally, if the above personal criteria are met, the court, to protect the child's best interests, must be satisfied that the proposed custodial arrangement is reasonable, and, on its face, workable.¹⁵² Finally, the statute itself provides a guiding, but not exclusive, list of ten factors affecting the best interests of the child.¹⁵³

146. *Id.* at 5.25-.27.

147. *Id.* at 5.27-.29.

148. *Id.* at 5.30-.33.

149. *Id.* at 5.33-.34.

150. *Id.* at 5.34-.36.

151. *Id.* at 5.36-.40.

152. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.20.

153. Florida Statutes section 61.13(3) (1982) states:

(3) For purposes of shared parental responsibility and primary physical residence, the best interests of the child shall be determined by the court's consideration and evaluation of all factors affecting the best welfare and interests of the child, including, but not limited to:

(a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.

(b) The love, affection, and other emotional ties existing between the parents and the child.

(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining

Because the statute places a high standard of cooperation on parents, specificity is imperative (1) in the delineation of what shared responsibility is to constitute for a given family and (2) for the continuing success of the arrangement decided upon.¹⁵⁴ In addition, since the statute contemplates joint legal custody and a judicial presumption exists in Florida against "divided" custody,¹⁵⁵ it is probable a child may properly reside most of the year with one parent (i.e. primary residence), subject to reasonable "contact" (visitation) with the other parent (i.e. secondary residence). However, both parents should have shared control of the child's upbringing, care and education and equal voice in decisions pertaining to the child's health, education, religious training, vacations, etc.¹⁵⁶

The statute requires parents to *confer* on these major decisions. The requirement to confer, and the absence of the word "agree" in the statute, provides legislative recognition that parents who are divorced may be unable to agree but *can* be expected to confer and cooperate

continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the parents.

(g) The mental and physical health of the parents.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

Id.

154. James Fox Miller, Melvyn Frumkes. *See also* Frumkes, *Negotiating and Drafting a Shared Parental Responsibility Agreement*, MANUAL, *supra* note 115, at 4.1-.34 (therein are sample clauses to provide for any possible contingency, i.e. "emergency decisions — unilateral permitted; [minimum] contact and access by the non-residential parent; name to be maintained; failure to exercise [contact and access], no waiver; daily decision-making responsibility; contingency for future change in circumstances; provision for future possible necessity of mediation and conciliation") (text relating to each of these clauses has been deleted).

155. Judge Barkett.

156. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.5.

with each other on major decisions in the best interests of the child.¹⁵⁷ As a practical matter, minor decisions "such as what and when to eat, when to do chores, and when to go to bed (i.e. day to day disciplines) should be decided by the parent with whom the child's primary physical residence is maintained."¹⁵⁸

Shared parental responsibility allows each parent to have his or her wishes heard. Perhaps more importantly for the child, shared parental responsibility attempts to approximate as much as possible the prior intact family unit.¹⁵⁹ Additional benefits of the thus created greater stability of the parental relationship, along with great psychological, philosophical, and physical involvement with the child by *both* parents, hopefully will perpetuate the cycle of shared parenting cooperation and flexibility¹⁶⁰ and outweigh any risks.¹⁶¹

2. *Restricted Shared Parental Responsibility*¹⁶²

If it is determined by a Florida court that "shared parental re-

157. Judge Barkett, Judge Kapner.

158. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.5.

159. Kapner, *Shared Parental Responsibility: Is It For Everyone?*, MANUAL, *supra* note 115, at 5.8.

160. *Id.* at 5.6-13.

161. *Id.* at 5.13-14.

For example, if factors such as parental maturity or fitness are negative, shared responsibility, because of its greater reliance on cooperation and flexibility, could run the risk of greater manipulation and arguments by both the child and the parents. A child who is shuttled back and forth between hostile parents of sharply different life-styles and disciplinary attitudes can only experience more difficult adjustment problems than otherwise. Some critics have opposed shared or joint responsibility on the grounds that "change and discontinuity threaten the child's emotional well-being; that joint custody requires the 'shuttling back and forth' of children, leading to lack of stability in the home environment; that children may become prey to severe and crippling loyalty conflicts."

Id.

162. This term appears in the MANUAL, *supra* note 115, at 4.18, adopted from the guidelines prepared by the Family Law Division, 13th Judicial Circuit, Hillsborough County, Florida. Its definition follows Florida Statutes section 61.13 (1982):

In restricted shared parental responsibility, each parent's division of responsibility is set out. Areas of decision-making include, but are not lim-

sponsibility” is inappropriate in a given situation, the next statutory alternative is *not* sole responsibility.¹⁶³ Rather, “parents may agree as to the division of various aspects of parental responsibility although the court has authority to reject and/or modify any such agreement”¹⁶⁴ or “the court may apportion the various aspects of parental care and control between the parties if such apportionment is: a) agreed to by the parties or b) found by the court to be in the best interests of the child.”¹⁶⁵

Restricted shared parental responsibility is provided for in Florida Statutes section 61.13(2)(b)2.a.¹⁶⁶ This section of the statute is of prime importance. It recognizes individual family uniqueness and gives statutory authority for the myriad of orders that now can arise from Florida Statutes section 61.13. Most importantly, it can be the basis for awarding physical custody six months to one parent and six months to the other or monthly variations thereof.¹⁶⁷

ited to: residential care, education, religious, moral, disciplinary, medical and dental, social, recreational, legal, travel and financial. Where the court designates one parent as having primary responsibility, the court should do so *only* after a finding that that parent is more likely to allow the child frequent and continuing contact with the other parent.

Id. at 4.18-19 (emphasis original).

163. FLA. STAT. § 61.13(2)(b)2.a. (1982).

164. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.19.

165. *Id.* at 1.18.

166. Florida Statutes section 61.13(2)(b)2.a. (1982) states in part:

In ordering shared parental responsibility the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interests of the child. When it appears to the court to be in the best interests of the child, the court may order or the parties may agree how any such responsibility will be divided. Such areas of responsibility may include primary physical residence, education, medical and dental care, and any other responsibilities which the court finds unique to a particular family and/or in the best interests of the child.

Id.

167. *Id.*

3. *Sole Parental Responsibility*

The final statutory alternative of sole parental responsibility is not favored in the statute and may only be ordered where the court has determined that shared parental responsibility, whether unrestricted or restricted, would be *detrimental* to the child.¹⁶⁸ Detrimental is a stronger term than “against the best interests of the child”¹⁶⁹ and carries with it a higher burden of proof on the parent requesting sole parental responsibility or on the court ordering it.¹⁷⁰ It is suggested that a balancing test be applied and only when the risks of shared parenting outweigh the benefits can the presumption in favor of shared parental responsibility be overridden.¹⁷¹

Sole parental responsibility implies parents are incapable of conferring and cooperating and also “implies that the relationship with one parent will-and-should be limited.”¹⁷² Arguably, it may even be required¹⁷³ that an agreement by the parents, who desire and have mutually agreed upon sole responsibility, shall state a finding “that shared parental responsibility would be detrimental to the child.”¹⁷⁴ This may

168. Florida Statutes section 61.13(2)(b)2. (1982) states in part: “If the court determines that shared responsibility would be *detrimental* to the child, the court may order sole parental responsibility.” (emphasis added).

Sole parental responsibility is defined in section 61.13(2)(b)2.b. as: “responsibility for the minor child . . . given to one parent by the court, with or without rights of *visitation* to the other parent.” (emphasis added).

In section 61.13(2)(b)2.b., the word “visitation” is used. It is the opinion of this author that the word as used in this section is in direct conflict with the deletion of the same word in section 61.13(2)(b)1., and in conflict with the recognized need for new terminology in the statute. It is therefore this author’s recommendation that the word “visitation” be replaced with the words “contact and access” by the legislature. “Contact and access” are words borrowed from Melvyn Frumkes and appear in the MANUAL, *supra* note 115, at 4.2-3.

169. Judge Kapner.

170. Kapner, *Shared Parental Responsibility: Is It For Everyone?*, MANUAL, *supra* note 115, at 5.7.

171. *Id.* at 5.14.

172. *Id.*

173. Divergence of view exists regarding whether an agreement or order for sole responsibility must track the words “detrimental to the child” if both parents have agreed that the sole responsibility is best for them. Judge Barkett and Melvyn Frumkes said the words must appear; Judge Kapner said they need not appear.

174. FLA. STAT. § 61.13(2)(b)2. (1982).

raise a constitutional issue. Parents may balk at being required to track the words of the statute in a voluntary agreement for sole responsibility. If challenged, a requirement of including the exact language of the statute in an agreement could be found to be an unconstitutional usurpation of parental rights when forced on parents against their will.¹⁷⁵

4. *Modification of a Previously Rendered Custody Award*

Until the 1982 enactment of Florida Statutes section 61.13, Florida case law prescribed a material change of circumstances to warrant modification of child custody. This may no longer be true in Florida; there are three possible approaches to modification of custody as a result of the 1982 revisions to the statute.¹⁷⁶

Chapter 82-96, section 2 states that "the provisions of this act shall be applicable to all proceedings under Chapter 61, Florida Statutes, that are *pending* on the effective date of this act,"¹⁷⁷ and section 4¹⁷⁸ provides for a liberal construction of the statute. The above sections read in conjunction with the discretionary powers vested in the courts by the legislature¹⁷⁹ furnish the basis for the alternative argu-

175. *Santosky v. Kramer*, 102 S. Ct. 1388 (1982). Based on this case, the State of Florida may have to justify by clear and convincing evidence the intrusion on parental rights if the statute is interpreted to require a statement of a finding that shared responsibility is detrimental to the child, if forced on parents against their wishes and belief when they both *desire* sole responsibility for personal reasons.

Arguably, though, *Santosky* may not be applicable; it is a termination of parental rights case and the issues as to custody and visitation may be considered entirely different. Appellate review may clarify this issue.

176. Until a case reaches the Florida District Court of Appeal on this issue for clarification, it is uncertain as to which standard will apply. This was a topic of discussion at the Florida Bar Continuing Legal Education Committee Course on October 8, 1982. The possible positions discussed *infra* pages 306-309 come either from that course or from the course manual.

177. 1982 FLA. LAWS ch. 82-96, § 3 (emphasis added). The word "pending" is not defined by the legislature.

But see Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.24-25 for Florida case law definitions of "pending."

178. Florida Laws chapter 82-96, section 4 (1982) states that "the provisions of this act shall be *liberally construed* in order to effectively carry out the purposes of this act." (emphasis added).

179. FLA. STAT. § 61.13(2)(b)1. (1982).

ments on the central issue: In a court determination of a previously rendered custody award, is the newly amended Florida Statutes section 61.13 enough of a changed circumstance itself to sustain a petition for modification?

An unchanging court, following established case law,¹⁸⁰ would say no.¹⁸¹ A well-established rule of statutory construction states "that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively."¹⁸² This is to enable parties to rely on the substantive rights created by the statute prior to the 1982 revisions.¹⁸³ Therefore, the prior two-prong test for modification¹⁸⁴ would remain the standard of review under this view and "the provisions of Cha. 82-96 should not be applied to proceedings for modification begun prior to the effective date of Cha. 82-96 if a final judgment of dissolution of marriage awarding custody has previously been rendered."¹⁸⁵ Under this conservative view, Florida Statutes section 61.13 cannot be the sole basis for modification of a prior custody award.¹⁸⁶

On the other hand, a liberal court could find that there is clear legislative expression in the statute¹⁸⁷ to warrant finding the statute

180. See, e.g., *Frazier v. Frazier*, 109 Fla. 164, 147 So. 464 (Fla. 1933).

181. "Where child custody award is rendered prior to the effective date of chapter 82-96, such child custody award may not be modified without a substantial change of circumstances." Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.26. Melvyn Frumkes also holds this view.

182. *Id.* at 1.23. But by examining the statute itself, it could be argued the legislature, by specific changes, has implied the contrary. Florida Statutes section 61.13(2)(b)1. (1982) which states in part: "The court shall determine all matters relating to the custody of each minor child of the parties as a part of *any* proceeding *under this chapter*. . . ." The words emphasized were added in the 1982 revision. In addition, the words that had previously followed *chapter* — "for dissolution of marriage" — were deleted. These changes could indicate a broader, rather than narrower, reading of the above phrase.

183. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.23.

184. See *supra* note 72 and accompanying text.

185. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.25.

186. *Id.* at 1.26. Two additional arguments are set forth on pages 1.26-27.

187. Florida Statutes section 61.13(2)(b)1. (1982) states in part: "It is the public policy of this state . . . to encourage parents to share the rights and responsibilities of child-rearing." See also *supra* note 183.

alone provides standing to seek modification. Under this view, because the legislative public policy statement is clear and the provisions of the act are to "be liberally construed to effectively carry out the purposes of this act,"¹⁸⁸ it could be argued the aforementioned rule of statutory construction is inapplicable. Therefore, a court adhering to this broad view would allow a modification proceeding based solely upon the changed circumstance of the revised Florida Statutes section 61.13,¹⁸⁹ even if a final judgment of dissolution of marriage awarding custody has previously been rendered.¹⁹⁰

Adhering to a middle-of-the-road view, a moderate court may find standing to seek modification dependent on the specific circumstances in each case.¹⁹¹ A threshold of changed circumstances would probably still be required.¹⁹² If a prior modification order came about after litigation of a custody dispute and the court based its decision on the prior facts and law, the court may be able to review the order if it appears the parties requested and were refused shared parental responsibility because of the then existing law.¹⁹³

Until this issue receives appellate review in Florida, no clear standard may exist as to modification of a previously rendered custody

188. FLA. STAT. § 61.13(2)(b)1. (1982).

189. Judge Barkett holds this view. Judge Barkett also stated that where a prior custody order was followed by numerous contempt hearings, review should be allowed.

190. Thus, a judge could give retroactive application to chapter 82-96 and not address the issue of impairment of vested rights. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.28-29.

191. Judge Kapner holds this view.

192. According to Judge Kapner, if the child is now much older than when the original custody agreement was made, this fact alone could be enough of a changed circumstance to authorize standing to seek modification. This would seem to be a lesser burden of proof than substantial or material change required by prior Florida case law. See *supra* notes 72-74 and accompanying text.

Also, Judge Kapner suggests the intent of the original agreement between the parties could be examined. Even though a pre-existing agreement does not reflect the language of shared responsibility, if the parties intended to share parental responsibility, the order may be changed to reflect the new terminology of Florida Statutes section 61.13 (1982).

193. Judge Kapner. Shared parental responsibility may now only be refused upon a finding that such an order would be detrimental to the child. FLA. STAT. § 61.13(2)(b)2. (1982).

award.¹⁹⁴

5. *Grandparents Given Standing to Enforce Visitation*

Florida Statutes section 61.13 has been amended to provide grandparents with “legal standing to seek judicial enforcement” of an award of visitation.¹⁹⁵ “It is unclear whether or not grandparents have legal standing to file or participate in an initial petition or a petition for modification of a final judgment so as to obtain visitation privileges.”¹⁹⁶ Since, under Florida Statutes section 61.13, the court shall determine all matters relating to custody in accordance with the Uniform Child Custody Act¹⁹⁷ which provides that all parties with an interest in the proceeding should be named, there is an argument for allowing grandparents to participate in either petition.¹⁹⁸ Also, “if the grandparents do not commence a proceeding, there seems to be no prohibition against a trial court modifying a custody award so as to grant grandparents visitation and allowing grandparents to participate in the proceeding.”¹⁹⁹

C. Can It Work?: Problems and Their Possible Resolution

Florida Statutes section 61.13 now specifically encourages parents to share all the rights and responsibilities of raising a child,²⁰⁰ and recognizes that a myriad of alternative orders may result.²⁰¹ Setting aside the major unresolved judicial issue of modification,²⁰² there will be three general problem areas for parties in reaching an agreement of shared parental responsibility: “(1) division of time; (2) issues concern-

194. The entire panel of speakers agreed to the lack of consensus as to how this issue will be resolved in the courts.

195. Florida Statutes section 61.13(2)(b)2.c. (1982) states in part: “Grandparents shall have legal standing to seek judicial enforcement of such an award.”

196. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.29-30.

197. FLA. STAT. § 61.13(2)(b)1. (1982).

198. MANUAL, *supra* note 115, at 1.30, (citing Putnal v. Putnal, 392 So. 2d 613 (Fla. 5th Dist. Ct. App. 1981)).

199. *Id.*

200. FLA. STAT. § 61.13(2)(b)1. (1982).

201. FLA. STAT. § 61.13(2)(b)2. (1982).

202. See *supra* notes 176-94. and accompanying text.

ing the child's welfare; and (3) money."²⁰³ Again, all of these can be handled in an infinite number of ways depending on the specific circumstances of each family.

In a proceeding for dissolution of marriage where there are minor children, the court has the authority to: "Order either or both parties to consult with a marriage counselor, psychologist, psychiatrist, minister, priest, rabbi or any other person deemed qualified by the court and acceptable to the party or parties ordered to seek consultation,"²⁰⁴ to aid the parties in coming to an agreement. Extra judicial means of resolution are necessary both to reach such an agreement and to decide any unforeseeable disputes.²⁰⁵

In conjunction with the amendments Florida Statutes section 61.13 passed under 1982 Florida Laws chapter 82-96, Florida Statutes section 61.21 was created to authorize the counties in Florida to "establish a family mediation or conciliation service to assist parties in resolving any controversy involving the family."²⁰⁶ This statute also provides that the court can refer the parties to the service upon motion of a party or upon its own motion;²⁰⁷ that all verbal and written communications which occur during the mediation or conciliation proceedings be considered confidential and inadmissible as evidence in subsequent legal proceedings, unless the parties agree otherwise;²⁰⁸ and that

203. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.22. Specificity in all three general areas of potential dispute is absolutely necessary for shared responsibility to be successful.

A major *specific* problem to be addressed relates to *Giachetti v. Giachetti*, 416 So. 2d 27 (Fla. 5th Dist. Ct. App. 1982), a recent decision which appears to inhibit the ability of the primary residential parent to leave Florida, notwithstanding the absence of specific words in an agreement to that effect. Melvyn Frumkes suggested that specificity in an agreement on this issue is necessary as a result of *Giachetti*.

204. FLA. STAT. § 61.052(2)(b)(1) *quoted by* Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.32.

205. Knight & Pollock, MANUAL, *supra* note 115, at 1.22.

206. Florida Statutes section 61.21(1) (1982) states: "Counties *may* establish a family mediation or conciliation service to assist parties in resolving any controversy involving the family." (emphasis added).

207. Florida Statutes section 61.21(2) (1982) states: "The court on its own motion or on motion of a party may *refer* the parties to this service." (emphasis added).

208. Florida Statutes section 61.21(3) (1982) states: "All verbal or written communications in mediation or conciliation proceedings shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless both parties agree

a family mediation and conciliation service serves a valid purpose and is authorized to be funded either by general county revenues or by levying a service charge of no more than two dollars on any circuit court proceeding.²⁰⁹ This "court-connected alternative to the adversary process" is the legislative answer to the unique problems in the area of domestic relations.²¹⁰

Florida Statutes section 61.21 contains no provision mandating mediation or conciliation. Also, this statute does not effectuate the court's determination because all happenings during mediation are confidential and inadmissible in court unless the parties agree otherwise. This is where this new shared parental responsibility statute falls short. Recognizing that agreements between the parties are to be encouraged and that very few of the shared responsibility agreements will be done within the framework of the adversary system in court,²¹¹ the implementation of the purposes of Florida Statutes section 61.13 cannot be accomplished without further action by the legislature. Arguably at least one mediation session, preferably a minimum of three should be required.²¹² Although a counter-argument can be made that parties should not be forced into mediation,²¹³ in order to (1) identify the par-

otherwise."

209. Florida Statutes section 61.21(4) (1982) states: "A family mediation or conciliation service is hereby declared to serve a valid public purpose. The board of county commissioners may support such a service by appropriating moneys from county revenues or by levying a service charge of no more than \$2 on any circuit court proceeding."

210. Orlando, *Mediation and Conciliation Under Section 61.21*, MANUAL, *supra* note 115, at 3.1. Judge Orlando defines mediation and conciliation, and distinguishes them from negotiation and arbitration. *Id.* at 3.1-.2.

211. Judge Orlando.

212. Judge Orlando said that ninety-five percent of the parties after three sessions of mediation come to some agreement or overcome post-judgment problems. *See also Joint Custody Legislation Passed by 23 States*, *supra* note 2, at 2507:

The new Iowa statute which takes effect July 1, 1982 . . . stipulates that on the application of either parent, the court shall consider granting joint custody even in cases where the parents do not agree to it. Before ruling on the petition in such a case, the court may require the parties to participate in custody mediation counseling to determine whether joint custody is in the best interests of the child.

Id. at 2507.

213. Judge Orlando.

ties as good candidates for shared parental responsibility,²¹⁴ (2) aid parties in the stress of divorce to reach the specificity of agreement that will be necessary on the logistics of shared parental responsibility, (3) resolve problems, and (4) to truly lessen litigation in this area,²¹⁵ mandatory mediation sessions with some form of court access to recommendations of the mediator, will assist in making the shared parental responsibility enactment, Statutes section 61.13, workable in the state of Florida.²¹⁶

V. Conclusion

With the enactment of the 1982 revisions to Florida Statutes section 61.13, the Florida legislature reaffirmed the court's wide discretion in the area of child custody to focus on the specific circumstances of the case and to determine what is in the best interests of the child. The legislature has incorporated by statute joint legal custody, using the innovative terminology of shared responsibility.

By creating a presumption for shared parental responsibility and expressing, in mandatory language, Florida's public policy of encouraging both parents to share the rights and responsibilities of raising the child, courts must make all efforts to accomplish that end. Specific

214. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.21-.22.

215. There is concern that Florida Statutes section 61.13 (1982) will result in an overload of cases flooding the courts. During the panel discussion on October 8, 1982, a suggestion arose that Florida should join many other states in creating a family court division in which judges would only hear domestic relations problems. To prevent high "burn-out" of judges in this emotional area, it was suggested also that this division be "underloaded." Melvyn Frumkes and James Fox Miller agreed with creating a family court division in Florida.

216. In California, mediation is mandatory where there is a custody issue. CAL. CIV. CODE § 4607 (West Supp. 1982).

Judge Orlando stated that at the present time it would appear that private practitioners in Florida cannot provide mediation services because of ethics problems. Orlando, *The Nuts and Bolts of Mediation*, MANUAL, *supra* note 115, at 3.6. As mediation becomes a more widely used tool and recognized as a means to incorporate shared parental responsibility in agreements thus lessening litigation, alternatives to the ethics problems facing attorneys arguably should be considered. The county-formed family mediation or conciliation service may not be able to handle alone the large number of possible parties. FLA. STAT. § 61.21(1), (4) (1982).

guidelines are provided to aid the court in its determination. The judicial presumption against divided custody makes it unlikely that the physical residence of the child will be equally shared six months with each parent. But if the circumstances so warrant, i.e. equally divided physical custody is workable for the family, the statute provides the authority for the courts to so order.

Parents are now expected to confer on major aspects of child-rearing although agreement between the parents is not required in the statute. Should it become evident to the court that the parents are unable to confer, a variety of orders may result, thus dividing ultimate responsibility for aspects of child-rearing between the two. Sole responsibility is the last alternative, only ordered upon a showing that shared responsibility would be detrimental to the child's best interests.

In addition to the changes in semantics and the increased emphasis on individual circumstances, the Florida legislature has accomplished specific substantive changes. The demise of the tender years doctrine is statutorily mandated. Grandparents now have standing to seek judicial enforcement of a visitation award. The parent with whom the child does not primarily reside now has access to records pertaining to that child.

However, certain problem areas remain. Until a modification petition receives appellate review, the standard of review for modification of custody remains uncertain. Although the legislature authorized a new statute providing for mediation and arbitration, there is no mandatory participation required as an extra-judicial means for the parents in executing and implementing a custody agreement. Until re-education of parents, citizens, and attorneys occurs regarding the meaning of shared responsibility, the fears and reluctance related to this joint legal custody statute will slow its total implementation by the courts and full incorporation in agreements. Finally, we must await judicial clarification of the 1982 revisions of Florida's shared parental responsibility statute through appellate review to provide full understanding and consistency in application of the statute in Florida.

Renee Goldenberg

Art Forgery:

The Art Market and Legal Considerations

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Introduction

"The Fortune Teller" is a painting attributed to the French seventeenth century artist Georges de La Tour and is believed to have been painted between 1632 and 1635. It hangs in the Metropolitan Museum of Art and is in the center of a controversy that has spanned two continents and still has not been definitively settled. The painting was purchased by the museum for \$675,000 in 1968 and several distinguished critics have branded it a fake. They claim it is a forgery.¹ One might

1. Hochfield, *Can the Fortune Teller be Trusted?*, ART NEWS, Summer 1982, at 73.

wonder how a museum of the caliber of the Metropolitan Museum of Art could have been so incompetent as to have bought such a lemon. Others might wonder why the issue—whether it is or is not a fake—is still not settled to everybody's satisfaction. The issue that should grab center stage, however, is: Why does this painting, bought by the museum as a great work of art and enjoyed as such for an extended period of time, lessen in value when its authorship becomes doubtful? Does it really make any difference by whom or when it was painted? Is the test of greatness the aesthetic appeal, the ability of the work to be universally enjoyed, or is it defined in more concrete mundane terms? These questions are significant ones to be answered in the context of forgery and the art market and in consideration of the legal ramifications of a situation such as the one exemplified by "The Fortune Teller."

There have been many hoaxes and forgeries throughout history; Van Meegeren's faked Vermeers are among the most notable.² In many of these situations, as with Van Meegeren's forgeries, the works of art were enjoyed and mistaken for the originals. They provided aesthetic pleasure for the average person, and even the experts could not tell the difference. Why then do we brand such works as forgeries or fakes and provide legal penalties and remedies? In what context are these remedies and penalties established, and how adequate are they? Why do we have such difficulty in accepting a work of art once we have discovered it is a forgery? The "fake" painting or other work of art has the aesthetic qualities of composition, color, harmony, power, and whatever else one wants to attribute to aestheticism. Logically, there is no reason not to accept the work and value it.

Other cultures like the ancient Egyptians and Chinese made no distinction between copies and originals. There was no stigma attached to acquiring or making a copy. The Romans and Greeks commissioned and collected copies. During the Renaissance an acknowledged imitation could bring as much as half the price of the original. In the seventeenth century Emperor Rudolf II sent court painters to copy the best of Venice and Rome. Experts today still have trouble distinguishing these paintings from the originals.³ In Germany, if a work in one of their museums was determined to be a fake the word "nach" ("in the

2. L. ADAMS, *ART ON TRIAL* 115 (1976).

3. Banfield, *Art Versus Collectibles*, *HARPERS*, Aug. 1982, at 28, 31.

manner of") was put before the artist's name. The work could then be celebrated for its own merits and appeal.⁴ The art historian Walter Pach wrote that until modern times "copies, imitations, and even forgeries were made by men of such talent that the works possess qualities connoisseurs value in themselves."⁵ Today, however, our experience and view of art have shifted along with changes in culture, economics, and aesthetic values. To understand a problem such as forgery, it is pertinent for one to analyze it in relation to these changes—to look at it philosophically, historically, and legally. Art related problems such as forgery have arisen in the context of our culture and the art market, and our response and law reflect these factors.

I. Art Forgery—A Philosophical Enigma

In 1962 the Fogg Museum of Harvard University held an exhibition intentionally displaying copies along with original works. The guests were art connoisseurs who were to decide which was which. Among the items exhibited were an original portrait by Annibale Carracci, an important painter of the Italian baroque, and a copy of that work. An original Picasso and two forgeries of the same were also displayed. Many of the experts incorrectly picked the forgeries instead of the originals.⁶ Therefore, the disturbing question arises whether these forgeries or copies then became less beautiful or less valuable because painted by somebody else. "The fact that even professional experts are unable to point out the difference in artistic merit between the true and the false Picasso, Carracci, or Vermeer is conclusive proof that no such difference can be registered by the laymen's eyes."⁷ If we do not see any difference is there really an artistic difference? Are we so myopic that a signature or the postmark of a period is more important than the intrinsic beauty of the object itself?

The answer lies in contemplation of the total art experience. Art does not live in a vacuum of aesthetic beauty but reflects the values, psyche, and structure of the people and society in which it was created.

4. G. APOLLINAIRE, APPOLLINAIRE ON ART: ESSAYS AND REVIEWS 1902-1918, at 10 (1972).

5. Banfield, *supra* note 3, at 31.

6. Koestler, *The Aesthetics of Snobbery*, HORIZON, Winter 1965, at 50, 51.

7. *Id.*

Our attitude towards art—how we value it aesthetically—is tied to other factors as well. If one was to return home and say he met someone who looked like Elizabeth Taylor, that would not have the same value as one who could claim he met the actual Mrs. Taylor.⁸ So it is with art. As people, we are imbued with a system of value and criteria of excellence and worth. We have a sense of history from which art as well as other life experiences cannot be isolated. There is a “magical pull” inside of us that enhances the experience when we know it is real or historic. The shirt with a spot of blood becomes more alluring when it belongs to Rommel. Napoleon’s inkpot or a galley proof corrected by Tolstoy himself possesses a magic that we cannot escape.⁹ Perhaps this stems from a belief by “[o]ur forbears . . . that an object that had been in the possession of a person became imbued with his emanations, and in turn emanated something of his substance.”¹⁰

The art experience is a subjective one; all that has really changed when we discover a forgery is our own subjective experience. Only then does the work become less valued. We attribute to the original or authenticated version inordinate importance rooted in an almost unconscious feeling state of awe and magic.

The second process that interferes with our acceptance of forgeries or copies is “period consciousness.” We look at art in the context of its history and its place in that history as well as in the context of isolated present experience. There is a relativism of aesthetic judgment that makes allowances and perverts our scale of values. Much of art is only appreciated in the context of its place in the development of styles of art and if taken out of that context would be considered junk.¹¹

Thirdly, our aesthetic interest as a matter of psychology is tied to pecuniary interest and the realities of an art market. Many people find things beautiful in direct relation to their cost. Costliness is associated with power, fame, respect, and awe. Cost stirs the emotions which are then transferred to the work of art and contributes to aesthetic attitudes.¹² It would probably be safe to say that some people who stood in line to look at “Aristotle Contemplating the Bust of Homer,” after the

8. Banfield, *supra* note 3, at 34.

9. Koestler, *supra* note 6, at 53.

10. *Id.* at 52.

11. *Id.* at 53.

12. Banfield, *supra* note 3, at 34.

Metropolitan Museum of Art paid six million dollars to get it, would have just as soon stood in the same line to see six million dollars in cash.¹³ It is therefore apparent, although perhaps illogical, that to "the extent that these nonaesthetic feelings are linked with aesthetic ones, the public will not accept a perfect copy as a perfect substitute for the original."¹⁴

Lastly, a person who buys a forged work of art or the artist whose work is forged or misrepresented is injured in his possession or in his interest. There is an interference with the individual freedom of the victim. There is an infringement on the personal expression of the artist that is offensive to many people. There is frustration of purpose for the artist in his desire to express his individuality and a frustration of the collector's quest for truth in beauty or aesthetics.¹⁵ The fraud is perceived as a degradation. It is out of step with the social tenets of modern society and is an imposition upon one's desire for truth. "It threatens and abuses the possessions, values and interests of the individual and society."¹⁶ It is an aggressive act.¹⁷

II. Art Forgery—A Reflection of the History and Development of the Art Market

A. Early History

"Art history is traditionally taught in visual terms and rarely examines either the society influencing the artist or the market that absorbs the work."¹⁸ To understand the current highly competitive structure of the art market and its impact on society including the present legal ramifications, it is instructive to understand how this market developed.

Historically, art forgery and art fraud did not become an offense

13. *Id.*

14. *Id.*

15. Wurtenberger, *Criminal Damage to Art—A Criminological Study*, 14 DE PAUL L. REV. 83, 88 (1964).

16. *Id.* at 85.

17. *Id.* at 83.

18. P. FRISCHER & J. ADAMS, *THE ARTIST IN THE MARKET PLACE* 21 (1980) [hereinafter cited as P. FRISCHER].

under English law until 1562. There were a variety of punishments. They included having both ears cut off, standing in the pillory, slitting and searing the nostrils, forfeiting land, or even imposing perpetual imprisonment. In the seventeenth century capital punishment was included. Since that time there have been a hoard of statutes, but the penalties have lightened. Han van Meegeren made over half a million pounds from his forgeries and received only a one year sentence.¹⁹

Today this type of crime is considered more or less "white collar." Generally, the federal and state criminal statutes have been ineffective in reducing the amount of forged and faked works in circulation. Most of the applicable statutes are general antifraud statutes imposing relatively minor penalties. Only a few states have statutes that specifically deal with art fraud.²⁰ Therefore, in pursuing a remedy one, for the most part, must rely on civil remedies applying contract and tort law principles. These are not always satisfactory to the victim of the fraud who, while participating in the art market, has invested a great deal of time, money, and emotion.²¹

Originally there was no free market in art as we know it today; therefore, art forgery was not a profitable viable alternative. The concept of the creative artist as distinct from the artisan is relatively new. The status of the artist until the fourteenth century was that of a workman.²² Almost all painters also worked as decorators. They might be called upon to paint walls or to decorate furniture panels.²³ The artist in Greek or Roman times was treated as a carpenter or mason. He usually did not create a work unless it was ordered in advance because the risk of not selling it was great.²⁴

The role of the artist became more important with the growth of the power of the Church. However, the Church controlled the artist's creativity. It dictated what was acceptable and had a pervasive influence on the composition and execution of works of art. The clergy were

19. J. MILLS & J. MANSFIELD, *THE GENUINE ARTICLE* 12 (1979) [hereinafter cited as J. MILLS].

20. R. DUFFY, *ART LAW: REPRESENTING ARTISTS, DEALERS, AND COLLECTORS* 12 (1977).

21. *Id.* at 13.

22. P. FRISCHER, *supra* note 18, at 22.

23. G. SAVAGE, *FORGERIES, FAKES & REPRODUCTIONS* 2 (1964).

24. P. FRISCHER, *supra* note 18, at 22.

the organizational go-betweens in art dealings so they had to be obeyed.²⁵

At the time of the Renaissance the painters of pictures were regarded as the social equivalents of craftsmen. These painters were usually skilled in several related crafts and were commissioned by patrons who exercised some control over the work. During this period, it was known for an artist of note to make a replica of the work of another to fulfill a patron's order. (Of course, there were no copyright acts.) These duplicate works would not be regarded as forgeries today; but, there are implications in terms of possible misrepresentations which might arise when, along with the effect of time on the work, a copyist competently imitates the style, materials, and methods of a master. The problem becomes one of attribution.²⁶

Most artists were members of guilds. These guilds were trade unions and often controlled the materials used and the terms of sale. They examined the quality of the work produced condemning that which was inferior. Much of the artist's work was done with the aid of apprentices and employees. However, the influence of the master would predominate in the style of the work. For example, the face in a portrait might be painted by the master but the background filled in by another. Replicas of paintings would be ordered from the artist and carried out by a workman under his supervision. The buyers of the time were well aware of the nature of their purchase and made no demand that the master should execute every aspect of the creative process from priming the canvas to the finishing touches and signature.²⁷ "The signature was not the hallmark of genius, it was the trade-mark of the studio."²⁸ Today the fashion is for the personality cult. Collectors demand the unaided work of the artist. As a result, such work has more value than composites or replicas done by others, thus paving the way for art fraud, false attribution, and forgery.

Toward the end of the sixteenth century creativity was elevated to a new position of recognition. There began a transformation of the artist from artisan to creative human being. The idea espoused was that

25. *Id.*

26. G. SAVAGE, *supra* note 23, at 2.

27. *Id.*

28. *Id.*

since artists could translate God's creations into recognizable form, they must be closer to God than other people. Now the artist was in demand rather than the subject. Therefore, a work of art for the first time became subject to the laws of supply and demand. The notion of art for profit and investment was created, and some painters such as Raphael were in much demand and profited enormously, although most still lived in poverty.²⁹

This market in art gave the artist and his work a new status and created an elitism in art. The high cost of procuring an artist's services due to these laws of supply and demand made art less available to the ordinary person and produced a wide division between art and the lower classes. The emerging role of the artist at the height of the Renaissance, especially in Italy, was no longer compatible with the Mechanical Arts and the guilds. The artist became the companion and friend of princes. He was sought after and fought over by rival patrons seeking the fruits of his genius. This was in marked contrast with his role in the Middle Ages of the humble artist-decorator.³⁰ However, the Church still retained a great deal of control. For many artists it was their main sponsor and sole means of support.

As the struggle against the reformation developed, the Church tightened its control decreeing what should be painted, and many of the gains toward artistic individuality were stifled. The artist was once again an extension of the Church with little room to freely express or create. Art was brought back to the people reducing it from the elite status of the Renaissance.³¹

It was not until Louis XIV of France that artists were again elevated to a high status. Louis used art to enhance the splendor of his court. He exercised control by making the artists civil servants who had to satisfy the king to be paid. However, Louis' extravagances began to bankrupt the state and the position of the artist was again threatened. The artist now had to turn to the open market for a living. He had to struggle to survive without the support of the king as did all members of the lower class.³²

29. P. FRISCHER, *supra* note 18, at 24.

30. G. KEEN, *THE SALE OF WORKS OF ART* 21 (1971).

31. P. FRISCHER, *supra* note 18, at 24-25.

32. *Id.* at 26.

During this time Dutch painters, foreshadowing the twentieth century artists, had been fighting for survival in the open market. They were basically free of the religious and political restrictions that bound artists elsewhere in Europe. They produced paintings at will relying on their sales to make a living. This period saw the rise of the middle class collector in northern Europe while the fervor of the Italian Renaissance in art was essentially limited to the rich and noble and the Church.³³

The Dutch were aware of art as an investment and pushed collecting to extremes, creating a glut on the market which resulted in low prices. Artists had to turn to other employment. Some such as Vermeer and Rembrandt became dealers.³⁴ Speculation on the fame of artists was a natural outgrowth as it caught the imagination of almost all who could afford it.³⁵ There emerged a group of professional art dealers who saw opportunity in an oversupplied and under-promoted market. Dealers associated with particular artists making them sign contracts whereby the artist agreed to hand over to the dealer everything he created. However, the market was still in its early stages. These dealers did not have sufficient control of it and as a result the artists not under a contractual obligation continued to saturate the market with work. Prices fell even further and dealers turned to handling the works of the old masters. These were in short supply and had a greater potential for profit.³⁶

Thus, the foundation of the modern art market was laid and with it the law as applied to this market and to art in general developed. Economic circumstances in France and Holland necessitated artists find alternative means to sell their product. Salons were established with public exhibitions to introduce art to buyers. The idea of prints to distribute before sales, as publicity, was developed. Along with this came the idea of catalogues and printed criticism which were refined sales techniques but which paved the way for more indepth analysis of what actually constitutes art. Intellectualism pertaining to art was born as men discussed theories of art, and the resultant ideas influenced the creativity of artists eager for recognition.³⁷

33. G. KEEN, *supra* note 30, at 22.

34. P. FRISCHER, *supra* note 18, at 27.

35. G. KEEN, *supra* note 30, at 22.

36. P. FRISCHER, *supra* note 18, at 28.

37. *Id.* at 29.

This new spirit of individualism with an accompanying change of values further enhanced the status of the individual. As society more and more recognized the artist's genius, the higher was his rise in social life and the more advanced his economic gain. He was respected for his achievements and talents. The value of art was tied to the social recognition of its creator. It was considered a part of the artist and conceptualized as an "original" in the sense the public knows it today. It was important in the development of art forgery and art fraud that this value was associated with the artist through development of a capitalistic market. In today's modern market originals draw higher prices and are more valued as trade commodities. As a result, wherever art is disposed, traded, or collected there is the temptation for dishonest people to enrich themselves by forgery or fraud.³⁸

In Europe during the late eighteenth and early nineteenth centuries there was profound political change. The old elitist system was fighting for survival and the artist was again redefining his role in the marketplace. There developed "the idea of the artist as isolated and oppressed yet somehow above the real world. . . ."³⁹ This idea was perpetuated by the artists themselves as they took refuge from the harsh realities of life in a world of romantic unreality. The idea of art for art's sake and the refusal of the artist to accept many of the regimens of society scandalized the bourgeoisie. In the years before and after the French revolution, art became a weapon of propaganda for the people as the artist further realized his identity and began to see himself more and more as a producer of a commodity.⁴⁰

B. The Modern Market

The role of Great Britain in the late eighteenth and nineteenth centuries paralleled that of America in the late nineteenth and twentieth centuries in relation to the art market. The industrial revolution and expansion of its trading empire gave Britain power and prosperity. Travelers and traders returned to Britain from the Continent laden with art.⁴¹

38. Wurtenberger, *supra* note 15, at 84.

39. P. FRISCHER, *supra* note 18, at 29.

40. *Id.* at 29-30.

41. G. KEEN, *supra* note 30, at 23.

American collecting began its tremendous impact in the late nineteenth century. As America became the richest country in the world in the twentieth century, it achieved a dominant position in the art market. In this century art treasures from Europe have continuously flowed westward to the United States and the fashion for collecting has been firmly established.⁴² Art prices have multiplied phenomenally since the early 1950's,⁴³ and public interest in the sale of art has continued to bring exceptional prices. Everyone wants to get into the act, creating a ripe environment for fraud and forgery.⁴⁴

The art market, although dominated presently by the United States, is an international market with London as a center of operations. There are many important European collectors, and Japan is exerting a powerful influence.⁴⁵ Besides the growth of huge auction houses such as Sotheby's and Marlborough Fine Art, the post war period has been marked with a vast increase in the number of small scale dealers and collectors.⁴⁶ Due to a reverential attitude toward art, the educated middle classes have taken up collecting on an impressive scale. The availability of education to so many has created an environment which fosters respect for artistic genius and achievement, an appreciation of art history, and a clientele to purchase the more minor prizes of the art market.⁴⁷

Thus, today the art market is prosperous and conducive to fraud and forgery. Many people buy as much for an investment as for pleasure or aesthetic taste. As a result, the issue concerning the value of the "original" versus its aesthetic duplicate arises. There are important forces at work to prevent the separation of artistic and pecuniary value. The individuals who own originals have an important financial and emotional stake. If reproductions lose their stigma and become legitimate alternatives to original works, these originals would lose their value. Museums directly and indirectly (by virtue of tax exemptions for wealthy donors) are among the mainstays of pecuniary value. If "they were to substitute reproductions for originals the multibillion dollar art

42. *Id.* at 24.

43. *Id.*

44. *Id.* at 25.

45. *Id.*

46. *Id.* at 30.

47. *Id.* at 31-32.

business would fall into an acute and permanent recession."⁴⁸

Also, many of the experts relied upon to authenticate works of art are art historians. Due to their training, these experts are usually more sensitive to historical than to artistic values. In their view the authenticity of the work is of supreme importance. Most of the educated public who purchase art have learned from books and courses by these art historians; therefore, they also see art as part of this history or culture rather than as a solely aesthetic experience. The professional's respect for the authentic and his contempt for the inauthentic have been transferred to the public at large and the art market.⁴⁹

Therefore, many factors go into determining the value of a work of art and help to create a climate ripe for forgery and fraud. The nature of the art market has created a valuable pecuniary commodity. Associated with this pecuniary value are cultural ideals of beauty and aesthetics, artistic merit, the reputation of the artist, and also psychological factors such as prestige, and a sense of historical appreciation or magic. The work's provenance, i.e. whether it was once part of a great collection or not, enhances its value.⁵⁰ The condition of a painting is important as is its rarity or lack of it. Price is also dependent on who is selling and who is buying. A work will be worth more if sold by a dealer of worldwide fame rather than by an unknown dealer.⁵¹

Importantly, since the market is an international one, it is affected by the legal, fiscal, and commercial policies of the countries in which it operates. These policies can have a major influence on values. For example, Italy has more restrictions on export than England or the United States; therefore, the same painting would bring less in Italy.⁵² Auction prices in Paris are usually ten percent lower than prices in London because in France there is a sales tax. In the United States favorable tax considerations for donations to museums have encouraged speculation and lavish spending. In some cases, a collector who buys a painting that significantly increases in value can receive a charitable deduction for income tax purposes in excess of the amount he originally

48. Banfield, *supra* note 3, at 33.

49. *Id.* at 34.

50. G. KEEN, *supra* note 30, at 41.

51. *Id.* at 42.

52. *Id.*

paid for it.⁵³

III. Art Forgery—Legal Considerations

A. Factors Perpetuating Art Forgery

In recent years the exigencies of the art market and its development into a free trading international market have given ingenious forgers and ordinary confidence men plenty of opportunity for swindling the art buying public. There has been an increase of public awareness of art and an increase in the number of people who can afford to buy these works. They have proven to be in many cases a more attractive investment than the stock market. In these inflationary times when people tend to turn to collectibles to preserve the value of their money, art works have been a favorable investment. They have reacted to the market forces of supply and demand, increasing tremendously in value as the supply of authentic works remains relatively constant while consumer demand rises.

The market forces and structure of the art market have set the stage. The art forger steals the scene by taking advantage of the situation. Although since the advent of art forgery as a recognizable offense authorities and victims have sought to eradicate it, the risk of conviction for a sale of an art forgery is relatively small. There are several reasons for this. On one side stands the scientist with his technical equipment for detection of fraud. However, he must rely upon the art experts. It is the historian's or connoisseur's trained eye that first detects the possibility of the forgery, thus alerting the technicians. These experts are not available to everybody desiring to buy art and there are no licensing agencies, ethical committees, or competency exams to control the quality and validity of these authentications. The situation is ripe for negligent or incompetent advice. On the other side stands the forger who has all the modern technical and artistic resources available to aid in his attempt to stay one step ahead of the authenticators. In the middle are the galleries, the collectors, and the directors of museums. These participants many times unwittingly aid the forger. They often are hesitant in the face of costly advice, huge publicity, and a

53. *Id.* at 43. See I.R.C. § 170 (1983).

desire not to besmirch the good name of the art market or their own good names to admit publicly they have bought a forgery and thus fail to cooperate in criminal prosecution. If a fraud is reported the victim dealers are afraid they will lose customers, and the victim collectors are afraid they will lose the value of their bargain if the fraud becomes known. So they both remain silent—one to preserve his supposed integrity and one to preserve the supposed “authenticity” of his purchase.

The sympathies of the general public often tend to side with the forger. We see something glamorous in somebody with the skill and cunning to produce a work the apparent equal of a great master.⁵⁴ We somehow do not see this crime as being as aggressive or as debilitating as others. “[T]he crime of the forger is not violent, it is just cunning.”⁵⁵

Taking all the foregoing factors into account and considering: (1) there are jurisdictional problems due to the international nature of the art market,⁵⁶ and (2) that presently both federal and state laws are inadequate in specifically dealing with this problem, the risk of conviction for the sale of forged art remains relatively small.⁵⁷ Although all states have penal statutes that prohibit forgery, these statutes do not deal specifically with the marketing of fake paintings or art forgery as a distinct statutory crime.⁵⁸ Prosecutions generally fall under laws dealing with conspiracy, larceny, and fraud which are not conducive to effective art forgery deterrence.⁵⁹

“A work of art has been defined as an aesthetic expression that is a product of a particular time, place, and person. A fake pretends to this but is not.”⁶⁰ If a person wants to buy a fake and pays a proper price there is no legal problem. “The essential feature of art forgery is not imitation, which may have many other motives, but the intention to deceive either the general public or an individual dupe or—as a

54. J. MILLS, *supra* note 19, at 21.

55. *Id.*

56. Comment, *Current Practices and Problems in Combatting Illegality in the Art Market*, 12 SETON HALL L. REV. 506, 508 (1982).

57. *Id.* at 507.

58. Note, *Legal Control of the Fabrication and Marketing of Fake Paintings*, 24 STAN. L. REV. 930, 940 (1972).

59. Comment, *supra* note 56, at 507-08.

60. Committee Report, *Legal Problems of Art Authentication*, 21 THE RECORD 96 (1966).

rule—prospective buyers.”⁶¹ Therefore, to obtain a conviction the essential element is fraudulent intent. To obtain the necessary proof of intent in a criminal prosecution for art forgery under these statutes and to carry the burden of proof beyond a reasonable doubt is difficult.⁶² It is easy for the faker to claim he had no knowledge the fakes would be sold as originals. It is easy for the dealer to claim he thought the works were authentic.

It is also sometimes difficult for the prosecution to prove beyond a reasonable doubt the painting is indeed a fake. Scientific analysis is not foolproof and the appraisals of experts are just expressions of opinions which juries and judges may not find convincing. The prosecution must prove a connection between the fake and the faker which is costly and many times difficult because the chain of title or origins of the work often can be difficult to trace. This is further complicated by the international nature of the art market.⁶³

B. Other Problems to be Considered

The case of the *State of New York v. Wright Hepburn Webster Gallery, Ltd.*⁶⁴ is instructive as to some of the problems associated with the prevention of art forgery. Defendant David Stein was a former art dealer who had been convicted of forgery. After serving a jail sentence he was deported to France where he was again convicted for selling art forgeries in that country. While in jail he was permitted to produce fakes provided he signed his own name. After a successful London sale these paintings were exhibited in New York accompanied by the sign “Forgeries by Stein.”⁶⁵ The New York Attorney General attempted to enjoin the sale or transfer of these paintings on a theory of public nuisance.⁶⁶ Stein’s name could easily be removed and replaced with the name of the imitated master. Thus, the contention that a threat of

61. 2 J. MERRYMAN & A. ELSER, LAW AND THE VISUAL ARTS 6-87 (1979) [hereinafter cited as J. MERRYMAN].

62. Comment, *supra* note 56, at 508.

63. Note, *supra* note 58, at 941.

64. 64 Misc. 2d 423, 314 N.Y.S.2d 661 (Sup. Ct. 1970), *aff’d*, 37 A.D.2d 698, 323 N.Y.S.2d 389 (App. Div. 1971).

65. *Id.* at 424, 314 N.Y.S.2d at 663.

66. *Id.*

fraud was posed to the cultural welfare of that segment of the population which is involved in the sale and collection of works of art was valid in a pragmatic sense. However, legalistically the court refused to grant the relief asked for saying that no crime had been committed. Both sides conceded that no forgery was involved.⁶⁷ Stein has the right to sell under his own name even if there is the possibility of a future criminal act. The court cannot enjoin a potential crime. As regards forgery, the case does not fall within any sections of the Penal Law which requires a showing of intent to defraud. Also paintings such as the ones displayed are not included among the items declared by the statute to be a nuisance subject to abatement.⁶⁸

Another problem is represented by the case of *Weisz v. Parke-Bernet Galleries, Inc.*⁶⁹ where forged paintings were bought at auction pursuant to a catalogue that listed each artist and described each painting stating that each purchaser would be given a signed certificate. This was followed by a "disclaimer of warranty as to genuineness, authorship and the like."⁷⁰ The issues here were: (1) whether the plaintiffs knew of the disclaimer and, if they did, to what extent were they legally chargeable with such knowledge; and (2) if the answer to the first question is yes, to what extent was the auction house responsible, given this disclaimer, where a sale resulted from a representation of genuineness that later proved to be inaccurate.⁷¹ The court concluded on the trial level that even if plaintiffs had knowledge of the disclaimer other factors were relevant. The auction house had superior knowledge and experience. It demonstrated an intention that the buyers rely on the catalogue for their descriptions. This, accompanied by such factors as the wording and arrangement of the catalogue, the technical language, and the subtle presentation of the disclaimer, made it ineffective.⁷² Thus, the court relied on "requirements of fair dealing where there is a relationship between parties in which there is a basic unequal-

67. *Id.* at 428, 314 N.Y.S.2d at 668.

68. *Id.* at 427, 314 N.Y.S.2d at 667.

69. 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (Civ. Ct. 1971), *rev'd*, 77 Misc. 80, 351 N.Y.S.2d 911 (App. Div. 1974).

70. *Id.* at 1078, 325 N.Y.S.2d at 578.

71. *Id.* at 1079, 325 N.Y.S.2d at 579.

72. *Id.* at 1082, 325 N.Y.S.2d at 581.

ity of knowledge, expertness or economic power."⁷³

The judgment, however, was reversed on appeal.⁷⁴ The court maintained that there was no implied warranty of authenticity of authorship as a result of the expressed opinion or judgment of the seller. There was a clear disclaimer of warranty of authenticity in the catalogue and no willful intent to deceive was demonstrated.⁷⁵ The court relied upon common law precode principles which date back to the cases of *Jendwine against Slade*⁷⁶ and *Hyslop v. Shirlaw*.⁷⁷ If a seller represents what he believes, he is guilty of no fraud.⁷⁸

C. The Uniform Commercial Code—The Problem Continues

Now New York, where Weisz was tried, and a majority of the states have adopted the Uniform Commercial Code which could be relied upon under sections 2-313, 2-314, 2-315, and 2-316, dealing with warranties.⁷⁹

U.C.C. § 2-313

Generally under the Uniform Commercial Code "an express warranty can be created by an 'affirmation of fact or promise made by the seller,' a 'description of the goods,' or by a 'sample or model,' so long as the affirmation, description, or sample is part of the 'basis of the bargain.'"⁸⁰ The seller does not have to specifically make the warranty

73. *Id.* at 1082, 325 N.Y.S.2d at 582.

74. *Weisz v. Parke-Bernet Galleries, Inc.*, 77 Misc. 80, 81, 351 N.Y.S.2d 911, 912 (App. Div. 1974).

75. *Id.* at 80, 351 N.Y.S.2d at 912.

76. 2 Esp. 572, 170 Eng. Rep. 459 (1797). See J. MERRYMAN, *supra* note 61, at 6-106.

77. 42 Scottish Law Repr. 668 (Sheriff Court, Lanarkshire 1905). See J. MERRYMAN, *supra* note 61, at 6-106.

78. J. MERRYMAN, *supra* note 61, at 6-107.

79. Comment, *supra* note 56, at 523. This Note will not consider the warranty of title provided by section 2-312.

80. Comment, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939, 954 (1978). See U.C.C. § 2-313 (1979) which states:

Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows: (a) Any affir-

through actual words of warranty or guarantee. Likewise, the seller need not intend a warranty for such to exist.⁸¹ A critical issue to be determined is whether an affirmation of fact was made by the seller or whether he was just stating an opinion or puffing his product.⁸² This problem arises continuously in the sale of art works when dealers attribute value or authorship to a painting or other work of art. This was an issue in the *Weisz* case. Did the cataloguing of the paintings along with the names of the artists create an express or implied warranty despite the disclaimer? Generally a statement of opinion or of value by the seller is considered mere puffing and does not create a warranty.⁸³ However, express warranties have been found where the seller's expression tends to assert facts that are in some way measurable.⁸⁴

The seller's contention in regard to the application of the Code to the sale of works of art is that any statement as to value or authorship can be construed as merely opinion, identification, and description as opposed to a warranty. However, such a contention is not necessarily valid when considering the nature of the art market. To maintain that a dealer's description, attribution, or affirmation of authorship or value does not go to the basis of the bargain is to deny the realities of that market. One who purchases works of art, especially expensive pieces or those for investment, is paying for more than the materials and labor. The intrinsic value of the work is derived from its history, the reputa-

mation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

81. U.C.C. § 2-313(2) (1979).

82. Comment, *supra* note 80, at 954.

83. *Id.*

84. *Id.* at 955.

tion of the artist, its previous sales price, and even who the previous buyer or present seller is. It takes into account the judgments of critics, major dealers, and collectors. Its intrinsic value is even affected by how often it has been offered for sale within a given period of time. Therefore, a statement of authorship or even value refers to a specific attribute of the work and can reasonably be attributed to the basis of the bargain.⁸⁵

It also could be maintained that the most precise way to determine authorship is through acknowledgement by the artist himself. Once the artist dies, authentication is less precise, especially given the prevalence of forgeries and the expertise in their execution. Most people, therefore, buy works of art relying on the word of authenticators such as experts, dealers, and the like and must accept the reality of the uncertainty as to origin. Given this knowledge that a dealer's statement of authenticity is just his opinion, it could be maintained that it is incumbent upon the buyer not to rely on the word of the dealer as an express warranty. However, this would be impractical. It is the expert or dealer who actually sets the value through his affirmations; therefore, it would be only equitable that he should bear the burden of the truth of these representations. Thus, if the seller receives a high price for a painting as a result of an expert's opinion that it is genuine and receives the benefit of that bargain, he should bear the burden if that opinion later turns out to be incorrect.⁸⁶

U.C.C. § 2-316

If it is determined that the seller's description or affirmation is part of the basis of the bargain, the seller is considered to have made an express warranty.⁸⁷ Nevertheless, the seller may attempt to disclaim the warranty. Prior to the Uniform Commercial Code the seller could disclaim warranties virtually at will; caveat emptor was the order of the day.⁸⁸

Under section 2-316(1) of the Uniform Commercial Code general

85. *Id.* at 956.

86. *Id.*

87. U.C.C. § 2-313 (1979).

88. Comment, *supra* note 80, at 957.

disclaimers of express warranty are likely to be found inoperative.⁸⁹ Where these disclaimers conflict with specific express warranties, the Code “gives effect to the express warranty.”⁹⁰ To avoid liability the seller must prove that no express warranty existed initially. This may prove difficult because there are a variety of representations that give rise to express warranties.⁹¹ For example, is a listing with a name of the artist in a catalogue a representation that gives rise to an express warranty? (The *Weisz* case could fall directly under section 2-316.) This further demonstrates the sensitivity of the law to the art market. The courts dislike general language of disclaimer. If they refuse to give effect to such disclaimers, they can protect the art market from disreputable dealers who attempt to hide their fakes and poor quality works of art by using these disclaimers in their contracts.⁹² But it is still a question of fact whether the seller’s prior statement of authorship, value, etc. is consistent with a later statement that no warranties were made. So, although the Uniform Commercial Code provisions concerning express warranty and disclaimer can provide adequate protection for works of art, the buyer must prove the creation of the express warranty as to authorship and the inconsistency of the disclaimer with that express warranty.⁹³

89. U.C.C. § 2-316(1) (1979). This section provides:

Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

U.C.C. § 2-316, Comment 1 states: “This section . . . seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty. . . .”

90. Comment, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409, 420 (1972). See also U.C.C. § 2-316, Comment 1.

91. Comment, *supra* note 90, at 420.

92. *Id.*

93. *Id.*

U.C.C. § 2-315

In the context of art forgery, section 2-315 of the Uniform Commercial Code presents an alternative to the art buyer by establishing an implied warranty of fitness for a particular purpose. The warranty would arise under this section if “the seller at the time of contracting has reason to know any particular purpose for which the goods are required *and* that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods. . . .”⁹⁴ In order for liability to occur three elements must be present: (1) the seller must know or should know what the buyer’s particular purpose is; (2) there should be on the part of the seller actual or constructive knowledge that the buyer is relying on his skill; and (3) there must be actual reliance on the seller by the buyer.⁹⁵

A distinction should be made here between particular purpose, as contemplated by a warranty of merchantability related to a special use particular to the nature of one’s business, and ordinary purpose, meaning the customary use made of the goods.⁹⁶ Thus, if one purchases a painting for his own pleasure or a museum buys it for exhibition, the section could not be invoked since the art is being used for its ordinary purpose. They are the customary uses or not peculiar to the buyer’s business. It might be difficult to envision a use for a work of art that is not “ordinary” and would fall under the “particular use” requirement.⁹⁷ However, it is possible to make a case in the context of forgery

94. U.C.C. § 2-315 (1979) (emphasis added). This section provides:

Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

95. U.C.C. § 2-315. *See also* U.C.C. § 2-315, Comment 1; Comment, *supra* note 90, at 428.

96. U.C.C. § 2-315, Comment 2 states:

A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

97. Comment, *The Uniform Commercial Code Warranty Provisions and the*

if one was to buy for the purpose of completing a collection, or if the purchase is for a certain gift or investment based upon public demand for a particular artist or period. If the three aforementioned requirements are met, the sale of a forgery or that which was not bargained for could constitute breach of warranty for a particular purpose.⁹⁸

U.C.C. § 2-314

Lastly, with regard to section 2-314 of the Uniform Commercial Code dealing with the implied warranty of merchantability for the sale of goods, the issue in relation to art revolves around merchantability. The provision "limits liability to a 'merchant with respect to goods of that kind.'"⁹⁹ It would not apply to a private sale. Therefore, there could arise the issue of whether the seller-dealer is a merchant under the Code. Assuming he is a merchant, the buyer must establish the

Theory of Strict Liability in Tort as Solutions to Art Counterfeiting in Painting: A Critical Analysis, 20 St. Louis U.L.J. 531, 549 (1976).

98. Comment, *supra* note 90, at 428.

99. Comment, *supra* note 97, at 546. See U.C.C. § 2-314 (1979) which states:

Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-314, Comment 3 (1979) states: "A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply."

work was not merchantable because it was a forgery.¹⁰⁰ To be merchantable the goods must be fit for their "ordinary purpose" and must be "honestly resalable in the normal course of business because they are what they purport to be."¹⁰¹

Taking this into account, an argument could be made two ways. One could maintain that a forgery would defeat the purpose of buying an original and would certainly not be "honestly resalable" as an original. However, on the other side, a viable contention is that the ordinary purpose of a work of art is aesthetic pleasure. Thus, if one cannot tell the difference between a forgery and the original with one's naked eye, fitness for ordinary purpose can be accomplished with a forgery, which returns to the philosophical issue raised in part one of this article. Also, to be proven conclusively not to be "honestly resalable" is difficult. Only the artist himself knows for sure if the work is his. If he is dead and there is disagreement among the experts as to attribution or originality, such proof could be difficult. Just because several critics label a painting a forgery, this does not mean there are not others who will certify it as an original, thus fulfilling the "honestly resalable" requirement and creating a problem of certainty.¹⁰² The possible application of this section is also pertinent in that it does not require the showing of intent. The seller's knowledge of the defect is not essential. This would provide some redress to the victims of forgeries. It is a form of strict liability that could be applied even in situations where the seller is unable to discover the defect in the work of art.¹⁰³

D. New York Legislation Leads the Way

New York has led the way in terms of art related legislation. This seems to be a logical outgrowth of New York's status as a leading art market and the continuing problems of preventing art forgery and providing sufficient remedies. Illinois and California have attempted to follow New York's lead.¹⁰⁴ Such legislation can significantly affect the art market by setting standards of behavior or customs of the trade. In

100. Comment, *supra* note 97, at 546.

101. Comment, *supra* note 90, at 425. See U.C.C. § 2-314, Comment 8 (1979).

102. Comment, *supra* note 97, at 547.

103. Comment, *supra* note 90, at 423-24.

104. Hodes, *Wanted: Art Legislation for Illinois*, 57 ILL. B.J. 218, 219 (1968).

regard to forgeries, sales of works of art not warranted under New York law will not be readily accepted in other markets. Disclosures relied upon by buyers under New York law will most likely not be ignored in other markets not subject to the same requirements.

New York Penal Law § 170.45

Under section 170.45 of the Penal Law, New York has made art forgery a separate punishable offense. It makes "fraudulent misrepresentation and simulation of antiques, objects d'art, rare books and comparable matter"¹⁰⁵ a misdemeanor. However, proof of criminal intent is still necessary and it is questionable whether a penalty of up to a year in jail is sufficient deterrence given the huge profits to be made through forgeries.

New York General Business Law Articles 12-C to 12-H

Articles 12-C through 12-H of the New York General Business Law have helped alleviate the problem through additional regulation, although there is some duplication of and inconsistency with pre-existing law.¹⁰⁶

Article 12-C of the New York General Business Law attempts to protect the artist by imposing a trust obligation on the dealer.¹⁰⁷ Arti-

105. N.Y. PENAL LAW § 170.45 (Consol. 1977). This section provides:

Criminal simulation

A person is guilty of criminal simulation when:

1. With intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess; or
2. With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.

Criminal simulation is a class A misdemeanor.

106. Comment, *supra* note 80, at 961. See N.Y. GEN. BUS. LAW arts. 12-C to 12-G (Consol. 1980); 12-H (Consol. Supp. 1982).

107. N.Y. GEN. BUS. LAW § 219-a (Consol. 1980). This section provides:

Artist-art dealer relationships

1. Any custom, practice or usage of the trade to the contrary notwithstanding, (a) whenever an artist delivers or causes to be delivered a work of fine art of his own creation to an art dealer for the purpose of exhibition and/or sale on a commission, fee or other basis or compensation, the delivery to and acceptance thereof by the art dealer is deemed to be "on con-

cle 12-D relates to the protection of the art consumer. Some maintain

signment", and

(i) such art dealer shall thereafter, with respect to the said work of fine art be deemed to be the agent of such artist, and

(ii) such work of fine art is trust property in the hands of the consignee for the benefit of the consignor, and

(iii) any proceeds from the sale of such work of fine art are trust funds in the hands of the consignee for the benefit of the consignor,

(b) a work of fine art initially received "on consignment" shall be deemed to remain trust property notwithstanding the subsequent purchase thereof by the consignee directly or indirectly for his own account until the price is paid in full to the consignor. If such work is thereafter resold to a bona fide third party before the consignor has been paid in full, the proceeds of the resale are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full.

(c) no such trust property or trust funds shall be or become subject or subordinate to any claims, liens or security interests of any kind or nature whatsoever, of the consignee's creditors, anything in uniform commercial code section 2-326 or any other provision of the uniform commercial code to the contrary notwithstanding.

2. Any provision of a contract or agreement whereby the consignor waives any provision of this article is absolutely void except as hereinafter provided. A consignor may lawfully waive that part of subdivision one of section two hundred nineteen-a of this article which provides that "any proceeds from the sale of such work of fine art are trust funds in the hands of the consignee for the benefit of the consignor", provided: (a) that such waiver is clear, conspicuous, in writing and subscribed by the consignor and (b) that no waiver shall be valid with respect to the first two thousand five hundred dollars of gross proceeds of sales received in any twelve-month period commencing with the date of the execution of such waiver and (c) that no waiver shall be valid with respect to the proceeds of a work of fine art initially received "on consignment" but subsequently purchased by the consignee directly or indirectly for his own account.

(d) that no waiver shall inure to the benefit of the consignee's creditors in any manner which might be inconsistent with the consignor's rights under subdivision one of this section.

3. Nothing in this amendment shall be construed to have any effect upon any written or oral contract or arrangement in existence prior to the effective date hereof nor to any extensions or renewals thereof except by the mutual written consent of the parties thereto.

4. All of the provisions of this article are applicable notwithstanding the

this article is an unnecessary duplication of the Uniform Commercial Code. However, it is a type of express warranty legislation which creates a presumption that the authorship of a work of art is part of the basis of the bargain.¹⁰⁸ Thus the burden of proving authenticity is shifted from the buyer to the seller. This overcomes the difficulty of proof in an action for breach of warranty under the Code discussed previously. There is no longer uncertainty as to “whether the written description set forth in a bill of sale is sufficient to constitute a war-

absence of, or their conflict with, any written agreement, receipt, note or memorandum between the consignor and the consignee concerning any matter covered by such provisions and notwithstanding any conflict between such provisions and the uniform commercial code or any other statute, requirement, rule or provision of law.

108. *Id.* § 219-c. This section provides:

Express warranties

Any provision in any other law to the contrary notwithstanding: 1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, such description (i) shall be presumed to be part of the basis of the bargain and (ii) shall create an express warranty of the authenticity of such authorship as of the date of such sale or exchange. Such warranty shall not be negated or limited because the seller in the written instrument did not use formal words such as “warrant” or “guarantee” or because he did not have a specific intention or authorization to make a warranty or because any statement relevant to authorship is, or purports to be, or is capable of being merely the seller’s opinion.

2. In construing the degree of authenticity of authorship warranted as aforesaid, due regard shall be given to the terminology used in describing such authorship and the meaning accorded to such terminology by the customs and usage of the trade at the time and in the locality where the sale or exchange took place. A written instrument delivered pursuant to a sale which took place in the state of New York which, in describing the work, states, for example,

(i) that the work is by a named author or has a named authorship, without any other limiting words, means, unequivocally, that the work is by such named author or has such named authorship;

(ii) that the work is “attributed to a named author” means a work of the period of the author, attributed to him, but not with certainty by him;

(iii) that the work is of the “school of a named author” means a work of the period of the author, by a pupil or close follower of the author, but not by the author.

ranty of genuineness.”¹⁰⁹ When the seller gives the buyer a written instrument where authorship is stated, an express warranty of authorship is created.¹¹⁰ It also requires any disclaimers to be clear and conspicuous, making it more difficult for the seller to disclaim.¹¹¹

Article 12-E protects the artist’s reproduction rights. Although it has been preempted by the new federal copyright law, it has recognized that advances in the techniques and technology of reproduction have created a new dimension in the field of fine art. Article 12-E establishes the creation of new property rights with substantial monetary value based on the ability to reproduce formerly unique one-of-a-kind creations. The establishment of these property rights has created confusion and controversy as to who has title to and as to who may realize the proceeds from the reproduction of the sale of fine works of art. Here the legislature attempted to set guidelines in regard to the right of re-

109. Hodes, *Fake Art and the Law*, 27 FED. B.J. 73, 77 (1979).

110. N.Y. GEN. BUS. LAW § 219-c (Consol. 1980).

111. *Id.* § 219-d(1). N.Y. GEN. BUS. LAW § 219-d provides:

Disclaimers

Words relevant to the creation of an express warranty of authenticity of authorship of a work of fine art and words tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of section 2-202 of the uniform commercial code on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable. Subject to the limitations hereinafter set forth, such construction shall be deemed unreasonable if:

1. The language tending to negate or limit such warranty is not conspicuous, written and contained in a provision, separate and apart from any language relevant to the creation of the warranty, in words which would clearly and specifically apprise the buyer that the seller assumes no risk, liability or responsibility for the authenticity of the authorship of such work of fine art. Words of general disclaimer like “all warranties, express or implied, are excluded” are not sufficient to negate or limit an express warranty of authenticity of the authorship of a work of fine art, created under section two hundred twenty-two of this article, or otherwise; or
2. The work of fine art is proved to be a “counterfeit”, as that term is defined in this article, and this was not clearly indicated in the description of the work; or
3. The work of fine art is unqualifiedly stated to be the work of a named author or authorship and it is proved that, as of the date of sale or exchange, such statement was false, mistaken or erroneous.

production.¹¹² The courts had previously protected these interests, known in Europe as *droit moral*, by using tort or contract law with less than satisfactory results or consistency.¹¹³

Under article 12-F of the New York General Business Law, the consumer is given further protection by the implementation of a criminal penalty for the creation and circulation of false certificates of authentication.¹¹⁴ This misdemeanor applies to a situation not covered by forgery provisions of the Penal Law.¹¹⁵

The New Article 12-H: New York's Visual Multiples Disclosure Bill

Article 12-H of the New York General Business Law, better known as New York's visual multiples disclosure bill, is a relatively new section regarding works of art.¹¹⁶ It became effective in September 1981 with penalties to be imposed as of March 1, 1982; thus, it gave people some time to comply.¹¹⁷ This new bill was passed as a result of New York's dominant position as a center in the art market and its continuing effort to legislate in the art field to prevent art fraud, the corrupting of this market, and disillusionment on the part of the collec-

112. N.Y. GEN. BUS. LAW art. 12-E (Consol. 1980). See History. Art. 12-E, § 219-g provides:

Right to reproduce works of fine art

Whenever a work of fine art is sold or otherwise transferred by or on behalf of the artist who created it, or his heirs or personal representatives, the right of reproduction thereof is reserved to the grantor until it passes into the public domain by act or operation of law unless such right is sooner expressly transferred by an instrument, note or memorandum in writing signed by the owner of the rights conveyed or his duly authorized agent. Nothing herein contained, however, shall be construed to prohibit the fair use of such work of art.

113. Comment, *supra* note 80, at 962.

114. N.Y. GEN. BUS. LAW § 219-i (Consol. 1980). This section provides:

Falsifying certificates of authenticity of works of fine art

A person who, with intent to defraud, deceive or injure another, makes, utters or issues a false certificate of authenticity of a work of fine art is guilty of a class A misdemeanor.

115. Comment, *supra* note 80, at 962.

116. Nils, *Legal Protection for Print Collectors*, ART NEWS, Oct. 1982, at 8. See N.Y. GEN. BUS. LAW art. 12-H (Consol. Supp. 1982).

117. Chamberlain, *Fraudulence Curtailed*, AMERICAN ARTIST, Mar. 1982, at 10 [hereinafter cited as Chamberlain, *Fraudulence*].

tor which could cause the bottom to fall out of the market.

The worst offenses with regard to art forgery arise in the field of prints. Lithographs are especially vulnerable as today's technology makes it easy to fool the public into thinking photomechanical lithographic reproductions are real lithographs.¹¹⁸ In the past twenty years abuses have increased tremendously as the market has grown. Previously, prints did not bring enough money to make forging them worthwhile. However, this small market has grown to do an estimated business of \$125 million to \$150 million a year for modern prints alone.¹¹⁹ An increase in demand has caused prices to increase tremendously. People can now own original works by well-known artists by purchasing limited edition fine prints at a fraction of the cost of a drawing or painting by the same artist.¹²⁰ Due to the multiplicity of the print, a collector can ascertain its value at a particular time through auction results or prices asked by other dealers for the same print. This certainty creates a greater feeling of security for the buyer and enhances the desirability of prints as an investment.¹²¹

The basic problem with a print occurs when trying to distinguish between an "original" print and a reproduction.¹²² The aesthetic value is controlled by the degree of active participation of the artist and is diluted to the extent that the work is done by others. There is a difference in the artistry involved between an "original" print and a reproduction; thus, there exists a disparity in value.¹²³ It has been suggested that a modern print be classified as an original if it meets three criteria:

- (a) the artist has created the master image in or upon the plate, stone, wood block or other material for the purpose of creating the print; (b) the print is made from this material by the artist or pursuant to his directions; and (c) the finished print is approved by the artist.¹²⁴

118. Chamberlain, *Gold Brick Control*, AMERICAN ARTIST, Mar. 1981, at 10 [hereinafter cited as Chamberlain, *Gold*].

119. Wallach, *The Trouble with Prints*, ART NEWS, May 1981, at 60, 62.

120. R. DUFFY, *supra* note 20, at 59.

121. *Id.* at 60.

122. Committee Report, *supra* note 60, at 98.

123. Hodes, *supra* note 109, at 75.

124. Committee Report, *supra* note 60, at 98.

If a product is made by photomechanical and other processes, usually in large quantities independent of the artist's supervision and without his final approval, it is a reproduction. The sale of reproductions as "originals" or under misleading names such as heliographs results in much fraud. Other factors that must also be distinguished to qualify a print as a more valuable original include: the size of the edition, the quality and condition of the print, the date of the artist's signature and impression, or whether future editions will be printed.¹²⁵

This new law which covers prints and photographs sold for \$100 and up is "an attempt to design a law that would deter deceptive print practices, thwart misleading advertising and provide purchasers with 'the information for making an intelligent choice,' by legally requiring the disclosure of certain facts that—as the law points out—most reputable dealers already furnish voluntarily."¹²⁶ It protects the buyer's

125. *Id.* at 98-99.

126. Nils, *supra* note 116, at 8. See N.Y. GEN. BUS. LAW § 220-b (Consol. Supp. 1982) which states:

Full disclosure in the sale of certain visual art objects produced in multiples

1. An art merchant shall not sell or consign a multiple in, into or from this state unless a written instrument is furnished to the purchaser or consignee, *at his request, or in any event* prior to a sale or consignment, which sets forth as to each multiple the descriptive information required by section two hundred twenty-c of this article for any period. *If a prospective purchaser so requests, the information shall be transmitted to him prior to the payment or placing of an order for a multiple. If payment is made by a purchaser prior to delivery of such an art multiple, this information shall be supplied at the time of or prior to delivery.* With respect to auctions, this information may be furnished in catalogues or other written materials which are made readily available for consultation and purchase prior to sale, provided that a bill of sale, receipt or invoice describing the transaction is then provided which makes reference to the catalogue and lot number in which such information is supplied. Information supplied pursuant to this subdivision shall be clearly, specifically and distinctly addressed to each of the items listed in section two hundred twenty-c of this article unless the required data is not applicable. This section is applicable to transactions *by and between* merchants, non-merchants, and *others considered art merchants for the purposes of this article.*

2. An art merchant shall not cause a catalogue, prospectus, flyer or other written material or advertisement to be distributed in, into or from this state which solicits a direct sale, by inviting transmittal of payment for a specific multiple, unless it clearly sets forth, in close physical proximity to

right to full disclosure. It is an attempt by the legislature to stifle such practices as the "use of editions 'stretched' by an undisclosed and unusually large number of artist's proofs, undeclared closely related editions, misrepresented reproductions and claims that a work is 'signed' "¹²⁷ by the artist when the signature is that of another. Interestingly, the law never uses the terms "original" or "fine print." The criterion is whether it is the artist's print approved by the artist after completion.

the place in such material where the multiple is described, the descriptive information required by section two hundred twenty-c of this article for any time period. In lieu of this required information, such written material or advertising may set forth the material contained in the following quoted passage, or the passage itself, containing terms the nonobservance of which shall constitute a violation of this article, if the art merchant then supplies the required information prior to or with delivery of the multiple:

"Article twelve-H of the New York general business law provides for disclosure in writing of certain information concerning multiples of prints and photographs when sold for more than one hundred dollars (\$100) each, exclusive of any frame, prior to effecting a sale of them. This law requires disclosure of such matters as the identity of the artist, the artist's signature, the medium, whether the multiple is a reproduction, the time when the multiple was produced, use of the master which produced the multiple, and the number of multiples in a 'limited edition'. If a prospective purchaser so requests, the information shall be transmitted to him prior to payment or the placing of an order for a multiple. If payment is made by a purchaser prior to *delivery* of such an art multiple, this information will be supplied at the time of or prior to delivery, in which case the purchaser is entitled to a refund if, for reasons related to matter contained in such information, he returns the multiple substantially in the condition in which received, within thirty days of receiving it. In addition, if after payment and delivery, it is ascertained that the information provided is incorrect, the purchaser may be entitled to certain remedies."

This requirement is not applicable to general written material or advertising which does not constitute an offer to effect a specific sale.

3. In each place of business in the state where an art merchant is regularly engaged in sales of multiples, the art merchant shall post in a conspicuous place, a sign which, in a legible format, contains the information included in the following passage:

"Article twelve-H of the New York general business law provides for the disclosure in writing of certain information concerning prints and photographs. This information is available to you in accordance with that law."

127. Nils, *supra* note 116, at 8.

To accomplish its purpose article 12-H is divided into sections according to the availability of information. Prints dated from 1950 to 1981, 1900 to 1950, and prior to 1900 require progressively less requirements of disclosure as the availability of information diminishes due to the age of the print.¹²⁸ Only that information which is reasona-

128. Chamberlain, *Fraudulence*, *supra* note 117, at 10. See N.Y. GEN. BUS. LAW §§ 220-c to 220-f (Consol. Supp. 1982) which states:

§ 220-c. Information required

The following information shall be supplied, as indicated, as to each multiple produced *on or after* the effective date of this article:

1. Artist. State the name of the artist.
2. Signature. If the artist's name appears on the multiple, state whether the multiple was signed by the artist. If not signed by the artist then state the source of the artist's name on the multiple, such as whether the artist placed his signature on the master, whether his name was stamped or estate stamped on the multiple, or was from some other source or in some other manner placed on the multiple.
3. Medium or process. (a) Describe the medium or process, and where pertinent to photographic processes the material, used in producing the multiple, such as whether the multiple was produced through the etching, engraving, lithographic, serigraphic or a particular method and/or material used in photographic developing processes. If an established term, in accordance with the usage of the trade, cannot be employed accurately to describe the medium or process, a brief, clear description shall be made. (b) If the *purported* artist was deceased at the time the master was made which produced the multiple, this shall be stated. (c) If the multiple or the image on or in the master constitutes a photomechanical or photographic *type of* reproduction of an image produced in a *different* medium, for a purpose other than the creation of the multiple being described, this information and the respective mediums shall be stated. (d) If paragraph (c) of this subdivision is applicable, and the multiple is not signed, state whether the artist authorized or approved in writing the multiple or the edition of which the multiple being described is one.
4. Use of master. (a) If the multiple is a "posthumous" multiple, that is, if the master was created during the life of the artist but the multiple was produced after the artist's death, this shall be stated. (b) If the multiple was made from a master which produced a prior limited edition, or from a master which constitutes or was made from a reproduction of a prior multiple or *of a* master which produced prior *multiples*, this shall be stated.
5. Time produced. As to multiples produced after nineteen hundred forty-nine, state the year or approximate year the multiple was produced. As to

bly obtainable is required. The dealer must provide certain basic infor-

multiples produced prior to nineteen hundred fifty, state the year, approximate year or period when the master was made which produced the multiple and/or when the particular multiple being described was produced. The requirements of this subdivision shall be satisfied when the year stated is approximately accurate.

6. Size of the edition. (a) *If the multiple being described is offered as one of a limited edition, this shall be so stated, as well as the number of multiples in the edition, and whether and how the multiple is numbered.*

(b) Unless otherwise disclosed, the number of multiples stated pursuant to paragraph (a) of this subdivision shall constitute an express warranty, as defined in section two hundred twenty-g of this article, that no additional numbered multiples of the same image, exclusive of proofs, have been produced.

(c) The number of multiples stated pursuant to paragraph (a) of this subdivision shall also constitute an express warranty, as defined in section two hundred twenty-g of this article, that no additional multiples of the same image, whether designated "proofs" other than trial proofs, numbered or otherwise, have been produced in an amount which exceeds the number in the limited edition by *twenty* or *twenty* percent, whichever is greater.

(d) If the number of multiples exceeds the number in the stated limited edition as provided in paragraph (c) of this subdivision, then state the number of proofs other than trial proofs, or other numbered or unnumbered multiples, in the same or other *prior* editions, produced from the same master, or from another master as described in paragraph (b) of subdivision *four of section two hundred twenty-c of this article*, and whether and how they are signed and numbered.

§ 220-d. Information required; nineteen hundred fifty to effective date

The information which shall be supplied as to each multiple produced during the period from nineteen hundred fifty to the effective date of this article, shall consist of the information required by section two hundred twenty-c of this article except for paragraph (d) of subdivision three, paragraph (b) of subdivision four and paragraphs (c) and (d) of subdivision six of section two hundred twenty-c of this article.

§ 220-e. Information required; nineteen hundred to nineteen hundred forty-nine

The information which shall be supplied as to each multiple produced during the period from nineteen hundred through nineteen hundred forty-nine shall consist of the information required by section two hundred twenty-c of this article except for paragraphs (b), (c) and (d) of subdivision three and subdivisions four and six of section two hundred twenty-c of this article.

§ 220-f. Information required; pre-nineteen hundred

mation in writing which is considered part of the basis of the bargain creating an express warranty. This warranty cannot be negated by the merchant for the lack of the use of formal words of warranty, or for the lack of intention or authorization to make a warranty, or because the statement could be interpreted as the seller's opinion.¹²⁹ If the informa-

The information which shall be supplied as to each multiple produced prior to nineteen hundred shall consist of the information required by section two hundred twenty-c of this article except for *subdivision two*, paragraphs (b), (c) and (d) of subdivision three and subdivisions four and six of section two hundred twenty-c of this article.

129. N.Y. GEN. BUS. LAW § 220-g(2) (Consol. Supp. 1982). N.Y. GEN. BUS.

LAW § 220-g provides:

Express warranties

1. Whenever an art merchant furnishes the name of the artist pursuant to subdivision one of section two hundred twenty-c of this article as to multiples created prior to nineteen hundred fifty, *the warranties created* by the provisions of section two hundred nineteen-c of article twelve-D of this chapter *shall apply*, except that said section shall be deemed to include sales to art merchants. *However, with respect to photographs produced prior to nineteen hundred fifty, and other multiples produced prior to nineteen hundred, as to information required by subdivision three of section two hundred twenty-c of this article, the merchant shall be deemed to have satisfied this section if a reasonable basis in fact existed for the information required.*

2. Whenever an art merchant furnishes the name of the artist pursuant to subdivision one of section two hundred twenty-c of this article for any time period after nineteen hundred forty-nine, and otherwise furnishes information required by any of the subdivisions of section two hundred twenty-c of this article for any time period, as to transactions including offers, sales, or consignments made to non-merchants and to another art merchant, such information shall be a part of the basis of the bargain and shall create express warranties as to the information provided. Such warranties shall not be negated or limited because the merchant in the written instrument did not use formal words such as "warrant" or "guarantee" or because the merchant did not have a specific intention or authorization to make a warranty or because any required statement is or purports to be, or is capable of being merely the seller's opinion. The existence of a basis in fact for information warranted by virtue of this subdivision shall not be a defense in an action to enforce such warranty. However, with respect to photographs produced prior to nineteen hundred fifty, and other multiples produced prior to nineteen hundred, as to information required by subdivision three of section two hundred twenty-c of this article, the merchant shall be deemed to have satisfied this section if a reasonable basis in fact existed

tion provided is erroneous, the buyer is entitled to a full refund. If the buyer can prove that the seller willfully failed to provide the required information or knowingly provided false information, the buyer may be able to collect treble damages and attorney's fees from the seller.¹³⁰

for the information provided. When information is not supplied as to any subdivision of section two hundred twenty-c of this article because not applicable, this shall constitute the express warranty that the subdivision is not applicable.

3. Whenever an art merchant disclaims knowledge as to a particular item about which information is required, such disclaimer shall be ineffective unless clearly, specifically and categorically stated as to such particular item and contained in the physical context of other language setting forth the required information as to a specific multiple.

130. *Id.* § 220-i. This section provides:

Remedies and enforcement

1. An art merchant, including a merchant consignee, who offers or sells a multiple in, into or from this state without providing the information required in sections two hundred twenty-b and two hundred twenty-c of this article for any time period, or who provides information which is mistaken, erroneous or untrue, except for harmless errors such as typographical errors, shall be liable to the purchaser to whom the multiple was sold. The merchant's liability shall consist of the consideration paid by the purchaser with interest from the time of payment at the rate prescribed by section five thousand four of the civil practice law and rules or any successor provision thereto, upon the return of the multiple in substantially the same condition in which received by the purchaser. This remedy shall not bar or be deemed inconsistent with a claim for damages or with the exercise of additional remedies otherwise available to the purchaser.

2. In any proceeding in which an art merchant relies upon a disclaimer of knowledge as to any relevant information set forth in section two hundred twenty-c of this article for any time period, such disclaimer shall be effective unless the claimant is able to establish that the merchant failed to make reasonable inquiries, according to the custom and usage of the trade, to ascertain the relevant information or that such relevant information would have been ascertained as a result of such reasonable inquiries.

3. If an art merchant offers, *consigns* or sells a multiple and:

(a) Willfully fails to provide the information set forth in sections two hundred twenty-b and two hundred twenty-c of this article for any time period; or

(b) Knowingly provides false information; or

(c) The purchaser can establish that the merchant willfully and falsely disclaimed knowledge as to any *required* information, the purchaser of such a multiple may recover from the art merchant an amount equal to

Such information as the actual total number in the edition including the artist's proofs must be revealed if the print is represented as being from a limited edition. Also, a statement as to the authenticity of the artist's signature, the year executed, the medium used, and whether the work was authorized by the artist if there is no signature must be provided.¹³¹

The potential impact of this law is significant in that it provides an enforcement mechanism through its penalties previously lacking in similar versions adopted in California (1971), Illinois (1972), Maryland (1975), and Hawaii (1978).¹³² Interest in the new law has been expressed by such states as North Carolina, Michigan, and California where they do not have the enforcement procedures expressed in the New York law.¹³³

Some objections to the law have been raised by dealers who claim that the information necessary to complete a transaction provides undue paper work and expense, complicating the process. Some artists have complained that requiring disclosure of the total number in a limited numbered edition is too restrictive as they cannot wait and see how an edition will be received and sells. If an artist miscalculates and issues too many, the value inherent in scarcity is lost.¹³⁴ However, these

three times the amount recoverable under subdivision one of this section. As to this paragraph and paragraph (a) of this subdivision, a merchant may introduce evidence of the relevant usage and custom of the trade in any proceeding in which such treble damages are sought. This subdivision shall not be deemed to negate the applicability of article twelve-f of this chapter as to authenticity and article twelve-f is applicable, as to authenticity, to the multiples covered by the provisions of this article.

4. In any action to enforce any provision of this article, the court may allow the prevailing purchaser the costs of the action together with reasonable attorneys' and expert witnesses' fees. In the event, however, the court determines that an action to enforce was brought in bad faith, it may allow such expenses to the art merchant as it deems appropriate.

5. An action to enforce any liability under this article [article] shall be brought within the period prescribed for such actions by article two of the uniform commercial code.

131. Chamberlain, *Fraudulence*, *supra* note 117, at 10. See N.Y. GEN. BUS. LAW §§ 220-b to 220-e (Consol. Supp. 1982) for disclosure requirements.

132. Wallach, *supra* note 119, at 69.

133. Nils, *supra* note 116, at 8.

134. Chamberlain, *Gold*, *supra* note 118, at 11.

objections have been overcome when weighed against the potential contribution of this article to the stability and integrity of the market, and its important benefits provided to the collector who would otherwise have little recourse. Article 12-H helps establish a basis for values.¹³⁵ The fair market value of these prints is based partly on scarcity. It is pertinent for the collector in determining estate taxes; it is necessary for the seller who warrants his product and must make refunds or absorb additional penalties if labeling is inaccurate.¹³⁶

Earlier proposals of this law had included sculpture which is a runner-up to prints in the fraud market. However, it was not included due to an intention of giving it separate consideration in another law that deals specifically with sculpture.¹³⁷ The problems with regard to sculpture are similar to those of prints. Significant is the number of casts which have been made. Multiplicity of casts creates the potential for forgery, unauthorized editions, excess production, and inferior reproduction which might be dealt with through specific legislation within the next couple of years.¹³⁸

Conclusion

In today's world, aesthetic pleasure is not the sole test of the value of a work of art. Art is not created in a vacuum isolated from external influences both creative and economic. The experience of uncovering an art forgery that at one time was admired as a great work of art is inseparable from our ideas of art as a reflection of history—the truth about its creation and antiquity, the impact of a particular artist, and the functioning of an international art market.

Art forgery, as a crime of major proportion, is connected to market forces which, accompanied by generally inadequate legal protections, make it possible to amass huge profits. There is an alliance between society as a whole and art's economic status so that works of art have acquired tremendous investment value. The result is a currently thriving art market in which the artist has become the source of the economic interest of others and himself. The idea of the isolated es-

135. *Id.*

136. Chamberlain, *Fraudulence*, *supra* note 117, at 10.

137. *Id.*

138. Committee Report, *supra* note 60, at 99-100.

tranged artist now seems irrelevant in the context of the corporate age where this international art market contemplates huge investment and profit.¹³⁹

There are no simple solutions to the problem of art forgery. It is a function of man's creativity—creativity to produce and creativity to find ways to profit illegally. As of yet there has not been much specific legislation to deal with the problem. At the national level some sort of strict uniform legislation seems advisable; however, this has not occurred. Only a few states have adopted legislation specifically geared towards art forgery and art fraud. New York in its position as a center for the art market leads the way with the strictest most effective legislation. The new article 12-H of the New York General Business Law and a possible statute dealing specifically with sculpture are examples of New York's continuing innovative effort in this field. The Uniform Commercial Code can also be an effective remedy. The warranty provisions (sections 2-313, 2-314, 2-315, 2-316) if used effectively and creatively can provide relief to the unwary or duped victims of art forgery. Nevertheless, it should be recognized both legally and commercially that there is a necessity for an effective realistic approach to the problem of art forgery in view of the modern art market.

Peter Barry Skolnik

139. Gablik, *Art Under the Dollar Sign*, ART IN AMERICA, Dec. 1981, at 13.

Complaint Review Boards for Florida's Police Officers: Who's Complaining?

The Florida Legislature enacted Florida Statutes sections 112.531-.34¹ to formally grant specific civil rights to Florida law enforcement officers whose official conduct was under investigation. The rights entitle officers to notice of disciplinary action, presence of counsel, and to the formation of a complaint review board where grievances may be aired.² The statute provides that officers may institute civil suits where the rights are abridged;³ and every agency employing law enforcement officers is required to create a system to receive and process complaints.⁴ Injunctive relief may be sought where an agency fails to comply with these requirements.⁵

Florida Statutes section 112.532(2), which establishes the Complaint Review Board, has recently become controversial. The section states:

A complaint review board shall be composed of three members: One member selected by the chief administrator of the agency; one member selected by the aggrieved officer; and a third member to be selected by the other two members. Agencies having more than 100 law enforcement officers shall utilize a five-member board with two members being selected by the administrator, two members being selected by the aggrieved officer, and a fifth member being selected by the other four members. The board members shall be law enforcement officers selected from any state, county, or municipal agency within the county.⁶

Throughout Florida, courts have rendered opinions offering various in-

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1. FLA. STAT. § 112.531-.34 (1981).
 2. FLA. STAT. § 112.532(2) (1981).
 3. FLA. STAT. § 112.532(3) (1981).
 4. FLA. STAT. § 112.533 (1981).
 5. FLA. STAT. § 112.534 (1981).
 6. FLA. STAT. § 112.532(2) (1981).

terpretations and applications of this area of legislation. Although the Florida Supreme Court has recently reviewed a case specifically involving the purpose behind section 112.532(2), further legislative action is required to uniformly set the complaint review board process in motion.

The objective of this note is to examine the rationale behind the diverse opinions, to examine similar legislative action in other progressive states, and to offer suggestions to achieve a clarified statutory scheme in Florida concerning the civil rights of its law enforcement officers. In addition, since the statute includes provisions for dismissals or suspensions, its compliance with procedural due process requirements will be reviewed. Finally, this note will outline an innovative plan by which the civil rights of Florida police officers can be protected through the use of complaint review boards.

Legislative Purpose

Florida Statutes sections 112.531-.34 were enacted in 1974,⁷ and have remained relatively unchanged. Section 112.532(2) specifically deals with a complaint review board. As it presently exists, however, section 112.532(2) fails to define the purpose or power of the complaint review board. *Longo v. City of Hallandale*,⁸ a Broward Circuit Court decision, delved into the legislative proceedings records in an attempt to ascertain the intent of this enactment:

[T]he purpose of the act is to protect a police officer from arbitrary and unreasonable interrogation and investigation by superior officers whom he is otherwise in no position to resist. It is also clear from the legislative debates that the act was intended to apply only to *intra*-departmental interrogation and investigation, and had as its purpose the protection of subordinate officers from 'third degree' tactics by superior officers, especially in jurisdictions where the subordinate officer was not protected by civil service.⁹

As to section 112.532(2) specifically, the *Longo* court concluded:

7. 1974 Fla. Laws 728.

8. 42 Fla. Supp. 53 (Fla. 17th Cir. Ct. 1975).

9. *Id.* at 57.

In addition, we are uncertain as to the functions of the complaint review board provided in § 2(2), when and how it is to be implemented in the event of a dispute, what it is supposed to do, and what effect or weight is to be given and by whom to its determination, assuming it is supposed to make a determination.¹⁰

To assist the Florida Legislature in pinpointing areas requiring clarification through amendment, a review of similar enactments in Texas and Pennsylvania proves beneficial.

Civil Rights Protection for Police Officers in Other States

Policemen's Civil Service in Texas

The law enforcement officers of Texas have been afforded numerous civil rights to protect their employment status through Article 1269m, Texas Civil Statutes Annotated.¹¹ The Article establishes a *Policemen's Civil Service*,¹² complete with a commission overseeing the Civil Service activities, in all but the smallest cities in the state. The commission is comprised of three members who are appointed by the city's chief executive. Each member must be a *citizen* of the particular city, over twenty-five years of age, and must not have occupied any public office within the three years preceding appointment.

The commission is formally required to inspect all police departments annually to ensure compliance with the civil service regulations.¹³ It may further initiate investigations into matters concerning alleged violations of law enforcement officers' rights. The commission has the power to subpoena, order depositions and request production of evidence, as well as administer oaths. Article 1269m, in fact, comments that the commission's powers are to be honored in the same manner as those of any civil court.

In order for an officer to receive a review hearing before the commission, he must file a statement denying the allegations against him

10. *Id.* at 59.

11. TEX. REV. CIV. STAT. ANN. art 1269m (Vernon 1963 & Supp. 1982).

12. *Id.* § 1 Creation of Firemen's and Policemen's Civil Service; § 3 Firemen's and Policemen's Civil Service Commission. Texas firemen also have the protection of this statute.

13. *Id.* § 5a Investigations and inspections.

within ten days after notice of termination.¹⁴ The complainant has the right to counsel at the hearing, and may invoke the witness rule. The commission's decision is to be based solely on evidence presented at the hearing. If a policeman is dissatisfied with the commission's findings, that officer may petition the district court for relief within ten days after the decision.¹⁵ The court may set aside the commission's ruling and order the case tried *de novo*.

Where an aggrieved officer is granted reinstatement by the commission, the employing department must immediately comply; failure to do so will subject the department head to contempt sanctions. If the disobedience continues for ten days, the chief executive has a duty to discharge that department head from city employment.¹⁶

Texas courts have had much success in applying these specific guidelines to particular cases. For example, a Texas Court of Civil Appeals reviewed an order handed down by a city's Civil Service Commission in *Richardson v. City of Pasadena*.¹⁷ In *Richardson*, an aggrieved policeman petitioned the court to set aside the commission's order, which had affirmed his dismissal for refusing to submit to a polygraph examination. The officer claimed that, *after* the civil service hearing had concluded, the commission improperly received several affidavits buttressing the insubordination charges. The police officer contended that the commission violated his civil rights by reviewing the affidavits out of the presence of the officer or his attorney.

The Court of Civil Appeals first concluded that the dismissal was founded upon legitimate principles: "Insubordination in refusing a reasonable and constitutional command cannot be upheld without jeopardizing the system of police administration which is premised on discipline."¹⁸ The court then rejected the claim that the post-hearing

14. *Id.* § 17 Procedure before Commission.

15. *Id.* § 18 Appeal to District Court.

16. *Id.* § 16 Indefinite suspensions.

17. 500 S.W.2d 175 (Tex. 14th Civ. App. 1973), *reversed on factual grounds*, 513 S.W.2d 1 (Tex. 1974). For a discussion of the *Richardson* reversal, see *infra* note 19.

18. *Richardson*, 500 S.W.2d at 177. *Accord* State Dep't of Highway Safety and Motor Vehicles v. Zimmer, 398 So. 2d 463 (Fla. 4th Dist. Ct. App. 1981); Farmer v. City of Fort Lauderdale, 400 So. 2d 99 (Fla. 4th Dist. Ct. App. 1981).

But see Farmer v. City of Fort Lauderdale, 8 Fla. Law Weekly 68 (Fla. Feb. 20,

affidavits tainted the commission's ruling, and refused to order a new hearing. The fact that substantial evidence had been presented *during* the hearing, in the presence of the officer and his counsel, was sufficient to find the officer guilty of insubordination. However, the court, in dicta, stated that if the post-hearing affidavits had been the sole basis for the commission's decision, the officer's due process rights would have been violated.¹⁹

1983) (Case No. 61,001), in which the Florida Supreme Court overturned the *Zimmer* rationale which had established the reasonableness of ordering police officers to take polygraph examinations, so long as officers were not coerced into waiving their Fifth Amendment rights against self-incrimination. The court discussed the stance of other jurisdictions on the reasonableness issue related to compulsory polygraph examinations of public employees, including *Richardson*.

Justice Adkins, in his majority opinion, stressed the failure of polygraph proponents to demonstrate the science's reliability to a judicially recognizable level. Consequently, Justice Adkins deemed compulsory orders to submit to these examinations *unreasonable*. *Farmer*, 8 Fla. Law Weekly at 69 (citing *Zimmer*, 398 So. 2d at 466-67 (Anstead, J., dissenting)). "Suffice it to say that polygraph testing has not taken its place alongside fingerprint analysis as an established forensic science. It may someday meet that burden, but has as yet not done so." *Farmer*, 8 Fla. Law Weekly at 70. Recognizing that the complaining officer freely answered questions posed to him without the threat of polygraph testing, the majority concluded that:

[t]o further subject petitioner to the same questions when he is attached to a machine of undemonstrated scientific reliability and validity to obtain test results which could not be used in court, is, we believe, not a lawful and reasonable order and can thus not provide a basis for dismissal.

Id.

Chief Justice Alderman dissented, citing the *Zimmer* case as supporting the reasonableness of orders to submit to polygraph examinations in the *public* sphere, where the personal integrity of employees is a prime concern. *Farmer*, 8 Fla. Law Weekly at 71.

The *Farmer* decision severely hampers the internal investigative processes of Florida police departments. This concern was discounted by the *Farmer* majority, however, which adjudged that "the possible investigative benefit of building a case upon the foundation of the results of a polygraph examination is too thin a reed to support a denial of a police officer's right to be subjected only to lawful and reasonable orders." *Id.* at 70. Judicial and legislative attack against the *Farmer* ruling can be expected soon. Fort Lauderdale Assistant City Attorney Jerry Knight has indicated that the City will petition the United States Supreme Court for a writ of certiorari in *Farmer*.

19. *Richardson*, 500 S.W.2d at 178. See § 17 Procedure before Commission. Unfortunately, the availability of clear legislative guidelines does not necessarily assure their correct application. In *Richardson v. City of Pasadena*, 513 S.W.2d 1 (Tex.

It is important to recognize that, because the Commission's structure and procedures were clearly enumerated by the legislature, the appellate court had ample guidelines to follow in making its determination.²⁰

Civil Service Protection in Pennsylvania

Pennsylvania's statutory counterpart equals the specificity of the Texas statute.²¹ The two enactments differ, however, in the selection of commission members. While Texas places the authority to appoint with the chief executive of the particular city, and requires a three-year gap between public office and commission duty, Pennsylvania law dictates that elections by the city council be used to select commission members, and fails to require an interval from public office.²²

1974), the Texas Supreme Court reversed the lower court's ruling that substantial evidence of insubordination had been presented at the commission hearing. In its reversing opinion, the court stated that:

the testimony . . . was directly in conflict on the essential issue of whether Richardson disobeyed an order or merely refused a request. When the hearing ended, the Commission's decision rested on which man the Commissioners believed; there was no other evidence. The subsequently submitted affidavits bore directly on the essential fact issue in the case; yet Richardson had no opportunity to cross examine the affiants, object to the affidavits or offer rebuttal testimony prior to the Commission's resolution of this disputed fact issue.

Id. at 4.

Based on its perception of the facts, the court concluded that "[i]t is only when a decision is influenced by evidence of which one party has no knowledge or has no chance to confront and explain that a due process problem arises." *Id.*

20. Although the factual issues in *Richardson* produced differing opinions at the appellate levels, the clear and unambiguous legislation contained in Article 1269m allowed no discrepancies as to the legal principles to be applied:

The Firemen's and Policemen's Civil Service Act provides for a trial de novo in the district court in the event the policemen [sic] is dissatisfied with the decision of the Commission. Such an appeal is governed by the substantial evidence rule. The review is limited to an ascertainment of whether there was substantial evidence reasonably sufficient to support the challenged order.

500 S.W.2d at 177-78.

21. PA. STAT. ANN. tit. 53, §§ 12621-12638 (Purdon 1957 & Supp. 1982).

22. *Id.* § 12625 Civil service commission; election; organization; oath of commissioners; powers as to investigations.

The statutes correspond in their grants of power to these tribunals. The Pennsylvania commission's decisions are binding, and carry contempt sanctions for non-compliance. Both enactments require that notice of dismissal be given to the officer prior to actual termination, including notice of the officer's right to a review hearing.²³

Procedural Due Process Rights of Governmental Employees: Recent Supreme Court Rationale

Procedural Due Process and Federal Employment: Arnett v. Kennedy

Florida Statutes section 112.532(4) requires that notice of impending disciplinary action be given to an officer.²⁴ However, due to the fact that a dismissal may deprive a governmental employee of economic security and future employment, the statute could be constitutionally attacked as being insufficient in terms of procedural due process.

The United States Supreme Court, in *Arnett v. Kennedy*,²⁵ discussed the adequacy of procedural due process constraints set forth in a federal employment statute. Kennedy was a non-probationary federal employee who was terminated for allegedly slandering his superior. The employee asserted that the statute, which authorized termination only for *cause*, did not specify his right to a trial-type hearing before removal, thereby denying him procedural due process of law.

Justice Rehnquist, speaking for a plurality of the Court, pointed out that the federal statute had been supplemented by federal Civil Service regulations. These regulations enlarged the statute's protections, by requiring an evidentiary hearing before a Civil Service Commission where the employing agency had previously decided to termi-

23. *Id.* § 12638 Removal, etc.; statement of reasons; investigations and hearings; written charges against policemen and firemen; suspension pending hearing.

24. FLA. STAT. § 112.532(4) (1981) states:

NOTICE OF DISCIPLINARY ACTION.—No dismissal, demotion, transfer, reassignment, or other personnel action which might result in loss of pay or benefits or which might otherwise be considered a punitive measure shall be taken against any law enforcement officer unless such law enforcement officer is notified of the action and the reason or reasons therefor prior to the effective date of such action.

25. 416 U.S. 134 (1974).

nate the employee.

More importantly, the plurality opinion stated that a statute which allows termination only for *cause* may also establish the method in which *cause* is determined. Because the employee's interest is created statutorily, that interest may also be terminated by statute, without regard to the constitutional guarantees applicable to other types of interests. The Court reasoned that "the employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause."²⁶ Relating this theory to the facts of *Arnett*, Justice Rehnquist upheld the procedural limitations embodied in the federal employment statute, stating that "the Government might, . . . constitutionally deal with appellee's claims as it proposed to do here."²⁷

In *Arnett*, Kennedy also contended that he was effectively accused of dishonesty, thereby damaging his reputation as a loyal and trustworthy employee. He argued that the Fifth Amendment entitled him to a hearing before he could be deprived of this *liberty* interest.²⁸ The plurality responded negatively to this argument, by determining that the employee's reputation was not damaged as a result of the termination. To clarify this position, Justice Rehnquist cited *Board of Regents v. Roth*,²⁹ which involved an untenured teacher's attempt to be rehired:

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and

26. *Id.* at 152. Justice Rehnquist alluded to a sliding-scale approach to issues of constitutional protection: "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Id.* at 153.

27. *Id.* at 155. While the Court quickly passed over the property interest issue, its recognition of the review procedures afforded by the statute and supplemental Civil Service regulations implied that a property interest was granted to the employee, but that the review procedures satisfied due process requirements. This rationale leads directly to Justice Rehnquist's reliance on the theory of exhaustion of administrative remedies, later in the opinion.

28. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

29. 408 U.S. 564 (1972).

associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. . . . In such a case, due process would accord an opportunity to refute the charge. . . .³⁰

Justice Rehnquist concluded by pointing out the limited purpose of administrative hearings, and the need to exhaust those remedies before seeking judicial relief:

[L]iberty is not offended by dismissal from employment itself, but instead based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person an opportunity to clear his name, a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause. Here appellee chose not to rely on his administrative appeal, which, if his factual contentions are correct, might well have vindicated his reputation. . . .³¹

The concurring opinion of Justice Powell, with whom Justice Blackmun joined, found fault in Justice Rehnquist's reliance on the statute's own procedural limitations system: "Governmental deprivation of [a property or liberty] interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing."³² Justice Powell reiterated the Court's opinions in *Board of Regents v.*

30. *Arnett*, 416 U.S. at 156-57 (citing *Roth*, 408 U.S. at 573).

31. *Arnett*, 416 U.S. at 157. The plurality opinion concluded:

In sum, we hold that the [Act], . . . did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause *beyond that afforded here* by the statute and related agency regulations. We also conclude that the post-termination hearing procedures provided by the Civil Service Commission . . . adequately protect those federal employees' liberty interest, . . . in not being wrongfully stigmatized by untrue and unsupported administrative charges.

Id. at 163 (emphasis added).

32. *Id.* at 164. See *Boddie v. Connecticut*, 401 U.S. 371 (1971): "The formality and procedural requisites for [a due process] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Id.* at 378.

*Roth*³³ and *Perry v. Sindermann*,³⁴ which discussed the proper definition of a property interest, and the duties of agencies granting such interests. In *Roth*, the Court had established that a person was granted a property interest only where he had:

[A] legitimate claim of entitlement to it. . . . It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. . . .

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.³⁵

The *Sindermann* Court had emphasized that once a property interest had been granted, deprivation of that interest would have to be accompanied by some form of notice and a hearing.³⁶

Justice Powell reasoned that once a property interest was granted by the legislature, the *Constitution* would determine what procedural constraints would be required. Relating this rationale to the facts in *Arnett*, he found that the federal statute, which guaranteed continual employment absent *cause* for discharge, granted the employee a claim of entitlement to employment.³⁷ Justice Powell concluded that the em-

33. 408 U.S. 564 (1972).

34. 408 U.S. 593 (1972).

35. *Arnett*, 416 U.S. at 165 (citing *Roth*, 408 U.S. at 577).

36. *Arnett*, 416 U.S. at 165-66.

37. *Id.* at 166. Justice Powell further commented:

The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. . . . This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of a statutorily created property interest must be analyzed in constitutional terms.

ployee was thereby entitled to notice and a review hearing as required by the Due Process Clause.³⁸

Justice White's concurring opinion in *Arnett* found that, while the Constitution required notice and opportunity for hearing, the statute and its supplementary review guidelines satisfied these requirements.³⁹

Justice Marshall, dissenting in *Arnett*, agreed that the Constitution should govern the adequacy of termination review procedures. However, utilizing a balancing test to determine whether a *post*-dismissal hearing was sufficient under the circumstances, Justice Marshall found that the inevitable delays in the statute's appeal process unduly burdened the employee's financial resources, and necessitated a *pre*-dis-

Id. at 166-67. See also *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Justice Powell also discussed whether an evidentiary hearing was required *before* removal: "The resolution of this issue depends on a balancing process in which the Government's interest in expeditious removal of an unsatisfactory employee is weighed against the interest of the affected employee in continued public employment." *Arnett*, 416 U.S. at 167-68. Reasoning that the government's removal interest was substantial, and in light of the fact that appellee would be entitled to backpay and reinstatement if he prevailed on the merits, Justice Powell found that a *pre*-termination hearing was not necessary. *Id.* at 171. Cf. *Goldberg*, 397 U.S. 254, where the impending discontinuance of welfare benefits warranted a *pre*-termination hearing because "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264.

38. *Arnett*, 416 U.S. at 166. Although disagreeing with the plurality's approach to procedural due process analysis, Justice Powell ultimately concurred in the finding that the statute and Civil Service rules together provided an adequate termination review system.

39. *Id.* at 185-86. Justice White remarked:

[A]s a matter of due process, a hearing must be held at some time before a competitive civil service employee may be finally terminated for misconduct. Here, the Constitution and the [Act] converge, because a full trial-type hearing is provided before termination from the service becomes final. . . .

A different case might be put, of course, if the termination were for reasons of pure inefficiency, assuming such a general reason could be given, in which case it would be at least arguable that a hearing would serve no useful purpose and that judgments of this kind are best left to the discretion of administrative officials.

Id.

missal hearing.⁴⁰

Procedural Due Process and State Employment: Bishop v. Wood

More recently, the United States Supreme Court resolved a controversy involving the statutory grounds for termination of a municipal police officer. The petitioner, in *Bishop v. Wood*,⁴¹ asserted that a city employment ordinance violated his procedural due process rights by failing to grant him the right to a termination review hearing. Officer Bishop contended that, as a permanent city employee whose termination was authorized only on specific grounds, he had a sufficient expectancy of continual employment to constitute a protected property interest.

In rejecting the officer's property-interest argument, the Court noted that, because a state statute was involved, "the sufficiency of the claim of entitlement must be decided by reference to state law."⁴² The majority followed the trial court's interpretation of state law, which held that the employee was merely given certain procedural rights which, in the instant case, were not violated by the terminating agency. This conclusion effectively foreclosed the petitioner's "continual employment" argument, by classifying him as *terminable at will*.⁴³

The officer also asserted, however, that the reasons for his discharge seriously stigmatized his reputation, thereby depriving him of his *liberty* without due process.⁴⁴ Reasoning that the absence of public

40. *Id.* at 226-27. Justices Douglas and Brennan concurred in the Marshall dissent. Justice Marshall noted: "We have repeatedly observed that due process requires that a hearing be held *at a meaningful time and in a meaningful manner*, but it remains for us to give content to that general principle in this case by balancing the Government's asserted interests against those of the discharged employee." *Id.* at 212 (citing excerpts from *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added)). See also *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

Justice Marshall theorized that "the plight of a discharged employee may not be far different from that of the welfare recipient in *Goldberg* who, pending resolution of a controversy . . . may [be] deprive[d] . . . of the very means by which to live while he waits." *Arnett*, 416 U.S. at 220 (citing *Goldberg*, 397 U.S. at 264).

41. 426 U.S. 341 (1976).

42. *Id.* at 344.

43. See *Bishop v. Wood*, 377 F. Supp. 501, 504 (W.D.N.C. 1973).

44. Officer Bishop was dismissed based on a failure to follow certain orders, poor

disclosure prevented the alleged impairment of the officer's "good name, reputation, honor, or integrity",⁴⁵ the Supreme Court cited the rationale pronounced in *Board of Regents v. Roth*.⁴⁶ "[It stretches the concept too far] to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."⁴⁷ The Court affirmed the trial court's decision to deny hearing rights to the officer, by stating:

In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular, and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.⁴⁸

Justices Brennan and Marshall, in their dissenting opinion, reasoned that the charges made by the employing agency warranted a hearing to allow the officer an opportunity to clear his name. Although no public disclosure had been made, the Justices recognized that, when prospective employers inquired into the employee's past through his previous employers, disclosure of the charges was imminent.⁴⁹

Most importantly, the dissenters joined in censoring the majority's adoption of the rationale that the statute, and not the Constitution,

attendance at police training classes, causing low morale, and conduct unsuited to an officer.

45. *Bishop*, 426 U.S. at 348. See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); see also *Paul v. Davis*, 424 U.S. 693 (1976), which discussed the interplay of reputation and employment.

46. 408 U.S. 564 (1972).

47. *Bishop*, 426 U.S. at 348 (citing 408 U.S. at 575).

48. *Bishop*, 426 U.S. at 350.

49. "It is difficult to imagine a greater 'badge of infamy' that could be imposed on one following petitioner's calling; in a profession in which prospective employees are invariably investigated, petitioner's job prospects will be severely constricted by the governmental action in this case." *Id.* at 350. The dissent further reasoned that "merely because the derogatory information is filed in respondent's records and no 'publication' occurs until shortly after [petitioner's] discharge from employment does not subvert the fact that a postdeprivation hearing to accord petitioner opportunity to clear his name has been contemplated by our cases." *Id.* at 352.

governed the sufficiency of administrative review. The dissent pointed out that six Justices had plainly rejected that view in *Arnett v. Kennedy*.⁵⁰

Bishop v. Wood illustrates the Court's preference for a federalistic stance, when afforded a direct interpretation of state law which finds that no property interest has been created by state or municipal legislation. The *Arnett* and *Bishop* decisions offer the theory that, where property interests are specifically granted, evidentiary-type review hearings must be made available. Where such interests are lacking, however, compliance with statutory termination procedures is the only prerequisite to lawful dismissal.

This rationale directs the focus into Florida case law to determine whether state law enforcement officers have protected property interests in their employment. If such interests have been granted, termination procedures concerning those officers must comply with the requirements of procedural due process in order to sustain a constitutional attack.

Property Interests of Florida Police Officers

The issue of whether Florida Statutes section 112.532(2) granted law enforcement officers the right to a review hearing was discussed in *West v. State, Department of Criminal Law Enforcement*.⁵¹ Special

50. Justice White's dissent summarized: "The majority's holding . . . rests, then, on the fact that state law provides no procedures for assuring that the City Manager dismiss [petitioner] only for cause. The right to his job . . . is thus redefined . . . by the procedures provided . . . and as redefined is infringed only if the procedures are not followed." *Id.* at 357. The opinion of Justice White concluded:

The views now expressed by the majority are thus squarely contrary to the views expressed by a majority of the Justices in *Arnett*. . . . The ordinance plainly grants petitioner a right to his job unless there is cause to fire him. Having granted him such a right it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it.

Id. at 360-61. Compare *id.* at 345 n.8, where the majority attempts to distinguish *Arnett* by finding that the differences of opinion hinged on federal regulation interpretation, with *id.* at 360 n.3, where the dissent maintains that the Constitution's interplay with employment regulations was the obstacle dividing the *Arnett* Justices.

51. 371 So. 2d 107 (Fla. 1st Dist. Ct. App. 1978).

agent West was terminated for allegedly violating department orders. He requested a complaint review board hearing to determine whether his dismissal was justified. Upon the Department's denial of the request, West appealed directly to the First District Court of Appeal, requesting that his right to a hearing be established.

The First District held that section 112.532(2) did in fact grant West the right to a hearing.⁵² The court's decision was apparently swayed by West's lack of opportunity to examine evidence and cross-examine witnesses against him. In a questionable move, however, the appellate court concluded that the language of section 112.532(2) made it *apparent* that complaint review board hearings must conform with the requirements of due process.⁵³

This broad statement affecting section 112.532(2) is troubling, since no mention was made of statutory language implying any "legitimate claim of entitlement" to continual employment.⁵⁴ When viewed in light of the *Roth-Arnett-Bishop* sequence of cases, the *West* decision clearly falls short of judicially recognizing that Florida law enforcement officers enjoy property interests in their employment.

The ruling seems instead to have rested on the officer's claim of *liberty* deprivation, alleging that his reputation had been injured by media coverage of the controversy. The United States Supreme Court would apparently concur in granting West certain procedural due process rights, assuming the officer sufficiently pled injury to his reputation. However, if no liberty deprivation had been pled, the Court would no doubt rule that no hearing rights were granted absent a determination that a Florida employment statute had granted property interests to law enforcement officers.⁵⁵ Because *West* was primarily based on a liberty argument, no statutorily-created property interest was effectively established by the decision.⁵⁶

52. *Id.* at 109.

53. *Id.*

54. *See* *Arnett v. Kennedy*, 416 U.S. 134, 165 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

55. *See* *Bishop v. Wood*, 426 U.S. 341 (1976).

56. The *West* court no doubt recognized the absence of civil service protections available to officers of the Department, and that Florida Statutes section 112.532(2), forming a complaint review board, was the only legislation offering these officers any hope of receiving review hearings. Florida Statutes section 110.051(3) (1977) had ex-

The property-interest issue was more directly addressed, however, in *Ragucci v. City of Plantation*.⁵⁷ Lieutenant Ragucci was dismissed from employment after an investigation allegedly revealed his involvement in the sale of fully automatic weapons, and narcotics usage. The officer was given a Complaint Review Board hearing, which resulted in a recommendation affirming the dismissal. Officer Ragucci then sued to have his right to a City Council review hearing established, pursuant to the procedures adopted in the City Charter.⁵⁸

empted employees of the Department of Criminal Law Enforcement from the review procedures of the State Career Service System, contained in Florida Statutes section 110.061 (1977). In 1978, however, the Florida Legislature amended section 110.051(3) to provide that employees of the Department were now *subject to* section 110.061, *except in matters relating to transfer*. See 1978 Fla. Laws 720. These sections were renumbered in 1979: section 110.051(3) now appears as section 110.205(3); section 110.061 has been changed to section 110.227. See 1979 Fla. Laws 740. The amendments of 1980 (1980 Fla. Laws 1599), and 1981 (1981 Fla. Laws 842) have not affected subsection (3) of section 110.205.

Florida Statutes section 110.227 (1981) concerns the suspension, dismissal, reduction in pay, demotion, layoff or transfer of Career Service employees. Subpart (1) provides that permanent employees may be suspended or dismissed only for *cause*, e.g., negligence, insubordination, wilful violation of agency rules, conduct unbecoming a public employee, etc. Subpart (2) calls for the establishment of rules and procedures regarding disciplinary action, subject to approval by the Administration Commission. Subpart (5a) grants a permanent employee the right to written notice of disciplinary action at least ten days prior to the date such action becomes effective. The aggrieved employee must be given an opportunity to appear before the agency or official taking such action, within the ten-day period, in order to respond to the charges either orally or in writing. Suspended or dismissed employees are entitled to Career Service Commission hearings.

Florida Statutes section 110.305 (1981) spells out the powers and duties of the Commission. With the power to administer oaths, subpoena witnesses, and sanction hearing misconduct, perjury, or non-compliance with Commission orders, the Commission appears as a quasi-judicial body. Written notice of employee appeals must be filed within twenty days after receipt of notice of dismissal or suspension.

According to Florida Statutes section 110.309(5) (1981), the Commission's order is conclusive. A party may appeal that order, however, in the respective district court of appeal, pursuant to Florida Statutes section 120.68(2) (1981).

57. 407 So. 2d 932 (Fla. 4th Dist. Ct. App. 1981).

58. Plantation's City Charter provided that the mayor had a duty: to suspend any appointed officer, except councilmen, at any time for gross neglect or dereliction of duty; provided, however, that the grounds for suspension of a police officer . . . shall also include the following: Incompe-

The Fourth District Court of Appeal, reversing the trial court's ruling, held that the City's adopted procedures had to be followed, and that section 112.532(2) did not supplant that requirement. "What is at stake here is due process. Section 15 of the Charter conveyed upon the City's law enforcement officers a *property* interest in their employment because it expressly required that their termination be for cause."⁵⁹

The *Ragucci* court adopted the views expressed in *Thurston v.*

tency, neglect of duty, drunkenness, immorality, failure to obey orders given by proper authorities, insubordination or any other just or reasonable cause, at the same time notifying such officer or police officer in writing the cause of the suspension, and giving him notice to appear at the next regular meeting of the Council and answer thereto.

Id. at 934 n.3. Compare Lauderhill Code, Division 2 (Civil Service), particularly sections 2-37 (Discharge, suspension, demotion of employees), and 2-38 (Appeal to Board); Hallandale Code, Chapter 21, sections 21-10 (Discharge of permanent employees—Notice of discharge), 21-11 (Same—Right to appeal to civil service board; time of hearing; notice to employee of hearing; hearing to be public), and 21-12 (Same—Amendment of charges prohibited; procedure of hearing; right to counsel at hearing; decision by civil service board).

Municipalities have been granted power to legislate in these areas through Florida Statutes section 166.021(4) (1981), which states:

The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes . . . which affect . . . any rights of municipal employees, without approval by referendum. . . .

59. *Ragucci*, 407 So. 2d at 935 (emphasis added). Justice Anstead concurred specially, stating that the Plantation City Charter could be amended to do away with procedures which bog down the review process (such as the City Council's role in conducting the hearings). The concurring opinion also pointed out that termination of *Ragucci* could still be effectuated using the Charter's procedures, assuming that adequate grounds for dismissal existed. *Id.* at 936.

Plantation City Attorney Donald J. Lunny has indicated that an ordinance designed to place review hearings within the jurisdiction of a "Job Description Committee" has been proposed, in an effort to remove the City Council from the review process.

Dekle,⁶⁰ a Fifth Circuit Court of Appeals decision which had established property interests in employees under a Jacksonville Civil Service rule. That rule authorized suspension or dismissal of an employee only for *cause*, and included a lengthy checklist of possible employment violations satisfying the *cause* requirement. Also included were mandatory notice requirements, and an appeal procedure structured around a Civil Service Board.

The Fifth Circuit in *Thurston* held that "city employment which allows termination only for cause creates a constitutionally protectable property interest. Once created, the employment property interest may not be taken away without due process."⁶¹ The *Thurston* court ruled that the procedures contained in the civil service rule did comport with the requirements suggested in *Arnett v. Kennedy*.⁶²

The essential issue in *Thurston*, however, did not center on whether the existing provisions of the rule satisfied due process. The crux of *Thurston* focused on whether due process required the institution of additional procedural safeguards where employees are dismissed *before* review hearings are convened. The court responded in favor of the employees:

Where a governmental employer chooses to postpone the opportunity of a nonprobationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.⁶³

It seems clear that Florida employment statutes or ordinances, which condition termination on a finding of *cause*, grant employees a

60. 531 F.2d 1264 (5th Cir. 1976).

61. *Id.* at 1272.

62. *Id.* at 1273. See *Arnett v. Kennedy*, 416 U.S. 134 (1974).

63. *Thurston*, 531 F.2d at 1273. Although the Fifth Circuit recognized that *Arnett* involved the adequacy of *existing* procedures, "[*Arnett* guides] us to focus on procedures which will minimize the risk of improper termination associated with any dismissal process." *Id.*

constitutionally protected property interest in continual employment. The *Roth-Arnett-Bishop* sequence tacitly concludes that any legislation which affords employees this type of interest must also include their constitutional right to an evidentiary-type hearing to review terminations. The *Thurston* decision imposes further restraints where the hearing is to be held *after* actual dismissal occurs.

Do Sections 112.531-.34 Authorize Terminations Which Violate Procedural Due Process?

While the enactment of sections 112.531-.34 does not purport to grant any specific employment status to Florida law enforcement officers, section 112.532(4) authorizes dismissals and suspensions, conditioned only upon notification to the officer of the impending action and the reasons for it.⁶⁴

Imagine a situation where a Florida police officer has been granted a recognized property interest by statute or ordinance, but is terminated under the provisions of section 112.532(4) after an investigation into his conduct allegedly reveals wrongdoing. While section 112.532(4) requires only notice of the dismissal and the reasons for it, due process may require an evidentiary hearing into the propriety of the action. Without granting the officer a review hearing, the officer's property interest would be violated. A successful constitutional attack against section 112.532(4) will require amendments granting disciplined officers the right to review hearings.⁶⁵

64. FLA. STAT. § 112.532(4) (1981).

65. Of course, since the courts do not favor constitutional disputes, perhaps the Florida Supreme Court will take affirmative action by applying a *gloss* over this controversial legislation. The court may require some type of review hearing to satisfy any constitutional concerns. *See infra* note 88.

Where the procedural due process rights of *probationary* law enforcement officers are concerned, *Bembanaste v. City of Hollywood*, 394 So. 2d 1053 (Fla. 4th Dist. Ct. App. 1981), offers some direction. Citing the City's civil service regulations which expressly allowed dismissal of probationary employees without cause, the Fourth District found that the officer was not entitled to a review hearing. Footnote 5 of the *Bembanaste* opinion indicated that, notwithstanding this hearing denial, the officer may have been entitled to a hearing on other grounds, specifically if his complaint had alleged 'stigmatization' as a result of the dismissal.

See Codd v. Velger, 429 U.S. 624 (1977), a per curiam (5-4) decision which in-

Assuming complaint review boards were established to review dismissals of police officers, their present undefined powers are clearly inadequate to protect the due process rights of these employees. Gathering the suggestions offered in *Arnett v. Kennedy*⁶⁶ and the sample legislation highlighted from Texas and Pennsylvania, the Complaint Review Board introduced in section 112.532(2) should possess quasi-judicial powers and should conduct review hearings with similar formalities. The Board's decision should have a binding effect on the parties, and provisions should be made for contempt sanctions, in the event the ruling is not fully obeyed.

Statutory Interpretation Problems in the Florida Courts: Identifying the Purpose of the Complaint Review Board

Aside from the constitutional issues involved in implementing Florida Statutes sections 112.531-.34, Florida courts have produced various, if not contrary, interpretations regarding the purposes to be served by this legislation, and the procedures to be utilized in attaining those objectives. The disjointed and undefined layout of these sections has largely contributed to the confusion. Before any conclusions can be properly drawn concerning the actual purpose of the Complaint Review Board, however, a review of the applicable case law is necessary to re-

involved a nontenured city policeman's attempt to gain hearing rights to review his dismissal. Finding that no property interest question was at issue, the Court focused on the policeman's claim of stigmatization. Recognizing that the Due Process Clause of the Fourteenth Amendment granted the officer an opportunity to refute the charges against him, the Court commented that "if the hearing . . . is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Id.* at 627. Since the officer failed to substantially deny the charges, no right to a hearing was granted:

But the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is *solely* to provide the person an opportunity to clear his name. . . . Only if the employer creates and disseminates a *false* and defamatory impression about the employee in connection with his termination is such a hearing required.

Id. at 627-28 (emphasis added).

66. 416 U.S. 134.

veal the diverse opinions pronounced by the Florida courts.

A Broward Circuit Court decision, *Longo v. City of Hallandale*,⁶⁷ offers the most in-depth discussion of the apparent purposes behind sections 112.531-.34. Although the general intent to protect subordinates from intensive questioning was established by its lengthy investigation, the *Longo* court was unable to determine the exact purposes and powers attributable to the Complaint Review Board formed in section 112.532(2).⁶⁸

Another legislative flaw was revealed in *City of Hallandale v. Inglima*,⁶⁹ where two municipal police officers sued to enjoin their city employer from disregarding the reinstatement recommendation handed down by a complaint review board. The Fourth District Court of Appeal reversed the trial court's order granting a temporary injunction against the city. Although the appellate court's decision rested on several grounds, its most important statement revealed the *advisory* nature of complaint review board decisions.⁷⁰ Since the injunction was based

67. 42 Fla. Supp. 53 (Fla. 17th Cir. Ct. 1975).

68. *Id.* at 57.

69. 346 So. 2d 84 (Fla. 4th Dist. Ct. App. 1977).

70. *Id.* at 86. The Fourth District relied on AGO 076-38, 1976 Op. Att'y Gen. 65 (Feb. 18, 1976), which stated in part:

Since no quasi-judicial powers or duties are prescribed by statute for any such complaint review board, any such board that might be established in connection with s.3 [section 112.533] of the act is not, *by the terms of Ch. 74-274*, made an 'adjudicatory board' or one vested with quasi-judicial powers, duties, or functions.

However, a municipality, under the authority of the Municipal Home Rule Powers Act (Ch. 166, F.S.), can create such a board in conjunction with the complaint processing and investigative system mandated by s.3 (s. 112.533, F.S.) of the act and prescribe its powers, duties, and functions so as to grant the board such quasi-judicial powers necessary to give the findings and determinations of any such board the status of final adjudications. . . .

See also AGO 075-41, 1975 Op. Att'y Gen. 68 (Feb. 19, 1975), which commented:

Section 2(2), Ch. 74-274, Laws of Florida, provides that a complaint review board 'shall be composed' of persons from specified areas, but does not give it any powers or duties whatsoever. The legislative history of the bill is unilluminating as to what the review board was intended to do. Furthermore, the original bill, Senate Bill 84, from which the act is derived, gave no powers to the board. . . .

solely on the board's recommendation, such relief was improperly granted.

The Third District Court of Appeal, in *Waters v. Purdy*,⁷¹ further attempted to define the situations in which complaint review boards were available for termination review purposes. Officer Waters had been terminated for violating department personnel rules. The Third District emphasized the importance of defining the exact reasons for an officer's discharge when determining whether the right to a complaint review board hearing existed:

After scrutinizing Section 112.532, Florida Statutes (1975) in its entirety, we find that subsection (2) . . . must be read *in pari materia* with subsection (1) which provides in part:

. . . Whenever a law enforcement officer is *under investigation* and subject to interrogation . . . , such interrogation shall be conducted under the following conditions. . . .

. . . Waters was not under investigation, but rather was terminated for violation of . . . personnel rules which he admitted violating. . . . [S]ection 112.532(2), Florida Statutes (1975) is not applicable to the instant situation. . . .⁷²

Waters determined that only officers dismissed as a result of agency investigations were entitled to the protections of the statute. This theory was expanded when the protections to be incorporated into the complaint review board process were discussed in *West v. State, Department of Criminal Law Enforcement*.⁷³ The First District Court of Appeal in *West* granted complaint review board hearing rights to an officer who was dismissed for violating department operational rules. Surprisingly, the First District's remarks disclosing the underlying rationale used to reach that result were rather shallow and vague, although the court apparently established that the officer was under investigation at the time of his dismissal.⁷⁴

71. 345 So. 2d 368 (Fla. 3d Dist. Ct. App. 1977).

72. *Id.* at 369 (emphasis added).

73. 371 So. 2d 107 (Fla. 1st Dist. Ct. App. 1978).

74. Note that the employing agency *admitted* the applicability of section 112.532(2), but defended on the ground that the complainant had not timely requested the hearing while he was *under investigation*. This classification of investigation-related dismissals parallels the views expressed by the Third District Court of Appeal in

Responding to the lack of statutory guidelines defining the powers and procedures of complaint review boards, the *West* court ruled that due process constraints would apply. The decision seemingly transformed a statutorily-naked Board hearing into a quasi-judicial proceeding to be used in determining the validity of investigation-based terminations. The First District also failed to reconcile this grant of power with the Board's established *advisory* authority. While the result in *West* seems in line with notions of fairness,⁷⁵ the blatant absence of a well-organized, in-depth synopsis of the court's thought processes is troubling.

However, the distress generated by the *West* court's conclusory statements, and general theory of complaint review board use, was soon quashed. The Florida Supreme Court, in *Mesa v. Rodriguez*,⁷⁶ tangentially redefined the scope and purpose of section 112.532(2). *Mesa* involved a dispute between an arrested citizen and the arresting officer, concerning the officer's conduct during the incident. The officer attempted to establish his right to civil action against the complaining citizen through section 112.532(3).⁷⁷

While the *Mesa* decision held that the officer could not sue under section 112.532(3) because the citizen had not utilized the complaint process established pursuant to section 112.533,⁷⁸ the court in dictum pointed out that:

Waters.

75. The First District was apparently swayed by the absence of alternative review remedies at the aggrieved officer's disposal. *See supra* note 55.

76. 357 So. 2d 711 (Fla. 1978).

77. FLA. STAT. § 112.532(3) (1981) states:

CIVIL SUITS BROUGHT BY LAW ENFORCEMENT OFFICERS—Every law enforcement officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, or the head of such organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the officer's official duties or for abridgement of the officer's civil rights arising out of the officer's performance of official duties.

78. FLA. STAT. § 112.533 (1981) reads: "Receipt and processing of complaints—Every agency employing law enforcement officers shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such employing agency from any person."

If Rodriguez [citizen] had chosen, he could have lodged a complaint with the investigation system set up, pursuant to the statute, by the Miami Police Department. His *complaint* could have been reviewed by a Complaint Review Board. . . . And, the board, after a hearing, would have had authority to render an advisory recommendation as to action to be taken against Officer Mesa.⁷⁹

This dictum offered a suggested use for complaint review boards not readily ascertainable from the statute's face. Despite *Mesa's* views on the probable purpose of complaint review boards, however, Florida law remains unsettled on this issue. Although subsequent case law has concurred generally with the *Mesa* theory, a direct and authoritative pronouncement by the Florida Supreme Court is needed to fully and clearly resolve the existing uncertainty of complaint review board use.

The Fourth District Court of Appeal tracked the *Mesa* rationale recently in *Migliore v. City of Lauderhill*.⁸⁰ The *Migliore* court expressed its deep disapproval of the statutory interpretation pronounced in *West*. Officers Migliore and Picarelli were dismissed for disobeying a superior's order, although a citizen's complaint had been previously lodged against them. The officers were advised of their right to a hearing before the city's Civil Service Board,⁸¹ but opted to seek the empaneling of a complaint review board pursuant to section 112.532(2). Upon the city's refusal to submit to the officers' demands, petitions for writs of mandamus and injunctive relief were filed against the city.

The Fourth District Court of Appeal affirmed the trial court's refusal to grant judicial relief to the officers, most importantly on the ground that the facts surrounding the officers' dismissals rendered a complaint review board hearing inapplicable. Before rendering its interpretation of the complaint review board's purpose, the Fourth District expressed its dismay over the absence of meaningful legislative guidelines embodied in section 112.532(2). To establish the circumstances in

79. 357 So. 2d at 713 (emphasis added). The dissenting opinion of Justice Hatchett was not published, nor was any information concerning its contents available through the Clerk of the Florida Supreme Court.

80. 415 So. 2d 62 (Fla. 4th Dist. Ct. App. 1982), *approved*, 8 Fla. Law Weekly 159 (Fla. May 5, 1983) (Case No. 62,299). This author assisted Lauderhill City Attorney Anthony J. Titone in creating the appellee's jurisdictional and answer briefs to the Florida Supreme Court.

81. See Lauderhill Code §§ 2-37, 2-38.

which complaint review boards were to be used, the appellate court reviewed the entire statute, but centered its attention on section 112.533 for guidance:

The significant language of [section 112.533] for our present purposes is contained in the final phrase "complaints received by such employing agency. . . ." We interpret the statute as providing a law enforcement officer with a means of vindicating his actions and his reputation against unjust and unjustifiable claims made against him by persons *outside the agency which employs him*. We differ in that respect with the First District Court of Appeal. . . .⁸²

In order to fully clarify its position, in light of the fact that a citizen's complaint had initially subjected the officers to official scrutiny, the court continued:

Under our interpretation of the purpose of Section 112.532 et seq., appellants would have been entitled to a hearing on the basis of the original written complaint against them. It is important to note, however, that appellants were discharged not on the basis of that complaint but on the basis of their refusal to obey the order of a superior officer. We are of the view that a complaint review board is not a forum available to appellants to test the validity of their discharge under those circumstances.⁸³

82. *Migliore*, 415 So. 2d at 64 (emphasis added). See FLA. STAT. § 112.533 (1981). Note that although the Fourth District's interpretation of the Complaint Review Board's purpose mirrors that espoused by the Florida Supreme Court in *Mesa*, 357 So. 2d 711, the *Migliore* opinion makes no references to *Mesa* whatsoever.

83. *Migliore*, 415 So. 2d at 64-65. Commenting on the Complaint Review Board's questionable effectiveness in its present form, the Fourth District reiterated the finding that "its [the Board's] decision is not adjudicatory but advisory only." *Id.* at 65 (citing *City of Hallandale v. Inglima*, 346 So. 2d at 86). The *Migliore* court also focused on the doctrine of exhaustion of administrative remedies, stating that:

Appellants' claims . . . should have been brought before the appropriate administrative board. Here, a discharged, suspended or demoted employee of the city may appeal to the Civil Service Board. . . . The Board, after an evidentiary hearing, may order reinstatement and back pay. . . . Appellants, having failed to avail themselves of the appropriate administrative remedy, cannot now obtain reinstatement or recover back pay.

415 So. 2d at 65.

Practitioners no doubt will argue as to the extent to which the *West* and *Migliore* interpretations conflict. As with all apparently conflicting opinions, however, distinctions inevitably will be found. One possible distinguishing factor is the presence of civil service protections in *Migliore*, and the absence of such alternative remedies in *West*. Moreover, the equitable circumstances surrounding the two cases are clearly contrasted. The complainants in *Migliore* sought judicial relief without exhausting the administrative remedies available, while the complaint review board hearing in *West* represented the only review method conceivably available to the aggrieved officer. Interestingly, with officers of the Florida Department of Criminal Law Enforcement now enjoying state civil service protections,⁸⁴ the prevailing equitable thrust behind the *West* decision seems to have vanished. While *West* may have been decided fairly under the circumstances, the theory of complaint review board use which *West* supported has been conclusively overturned by the Florida Supreme Court's approval of *Migliore*.⁸⁵

See Florida Weld. & E. Serv., Inc. v. American Mut. Ins. Co., 285 So. 2d 386 (Fla. 1973): "Where a method of appeal from an administrative ruling has been provided, such method must be followed to the exclusion of any other system of review. Where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act." *Id.* at 389-90. *See also Brooks v. School Bd. of Brevard County*, 382 So. 2d 422 (Fla. 5th Dist. Ct. App. 1980).

The *Migliore* court also recognized a potential problem in the area of Complaint Review Board membership, as presently provided by section 112.532(2) (1981):

Further, the fact that the board is required to be composed of law enforcement personnel belies the kind of impartiality and lack of bias that are ordinarily requisites of a panel established to determine substantive rights between the body politic (standing in the shoes of the taxpayer) and one of its own whose right to continue to represent and therefor to financially benefit from that body politic has been challenged. We do not mean to suggest that a complaint review board so constituted would necessarily act in a biased manner; only that it gives the impression of impropriety, which the legislature would obviously have avoided at all costs.

415 So. 2d at 64.

84. *See* 1978 Fla. Laws 720.

85. *Migliore v. City of Lauderhill*, 8 Fla. Law Weekly 159 (Fla. May 5, 1983) (Case No. 62,299).

Conclusion

Florida Statutes sections 112.531-.34 lack the legislative clarity and structure necessary to facilitate accurate and consistent judicial applications. The absence of expressed procedures and powers to implement the newly-ascertained purpose of complaint review boards inhibits meaningful reliance upon these provisions. The Florida Legislature should amend sections 112.531-.34 to closely parallel the specificity and depth of the Texas and Pennsylvania enactments discussed previously.⁸⁶

As the court in *Longo v. City of Hallandale*⁸⁷ remarked, this legislation was apparently designed to protect the civil rights of law enforcement officers who did not otherwise enjoy civil service status. However, municipal ordinances and recent state legislation have brought civil service protections to seemingly all law enforcement officers in this state.⁸⁸ In addition, judicial developments up to and including the Florida Supreme Court opinion in *Migliore* have rejected the *Longo* view. The legislature must decide whether the purpose of this act has been accurately determined by the judiciary; if so, further legislative action is necessary to rid these sections of their present disabilities.

Moreover, the role which complaint review boards play in this legislative scheme remains a troubling mystery. In an attempt to reconcile the Board's placement among various civil rights provisions, this author offers the following analysis:

Because the legislature inherently utilizes legal jargon to ease judicial implementation, the word *Complaint* as used in section 112.532(2) gains crucial significance. A complaint represents the *initial* stage of litigation, or better yet, rights enforcement. Therefore, the theory that these boards are to serve as appellate forums for disciplined officers seems incongruous with the normal meaning given to the language used. A more plausible theory is that complaint review boards are to do just that—review complaints made by persons *outside* the police agency (citizens), concerning alleged misconduct demonstrated by the agency's officers.

In the event a complaint review board finds the complaint fairly

86. See TEX. REV. CIV. STAT. ANN. art 1269m (Vernon 1963 & Supp. 1982); PA. STAT. ANN. tit. 53, §§ 12621-12638 (Purdon 1957 & Supp. 1982).

87. See *Longo v. City of Hallandale*, 42 Fla. Supp. 53 (Fla. 17th Cir. Ct. 1975).

88. See *supra* notes 55, 57.

substantiated by the evidence presented, it may recommend (or compel, if proper amendments are made) that formal investigations commence into the implicated officer's conduct. At this point, the civil rights set forth by the remaining provisions of this statute are activated. In order to prevent the officer from damaging his civil defenses against the complainant, his rights to counsel, and reasonable *discovery*, must be observed and preserved throughout the on-going departmental inquiries. The statute's injunctive and mandamus relief provision is available where these crucial rights are abridged during the investigation.

In light of the proposed purpose behind section 112.532(2), perhaps the citizen-oriented complaint review board envisioned in *Migliore* and *Mesa* will be formally and definitively established by the legislature.⁸⁹ In view of recent skirmishes involving police officers and citizens, a review panel of this type would be useful in resolving disputes concerning police conduct, and in promoting the community's belief that police conduct can be effectively scrutinized.⁹⁰ Whatever the legislature's intentions may be, amendments clearly expressing those intentions are needed if complaint review boards are to be effectively used in the future.

Furthermore, the legislature must not overlook the procedural due process rights of those affected by the statute. If provisions of this statute authorize dismissals, some formal requirements of notice and hearing rights must be mandated to protect officers who have been granted property interests in their employment.⁹¹

89. Notwithstanding the Florida Supreme Court's approval of complaint review board use as espoused in *Migliore*, the Florida Legislature must elaborate through amendment as to how this supposed legislative purpose is to be achieved. Pre-hearing procedures must be established, as well as operating standards to maintain objectivity during the hearing process.

90. Despite the expectation that a citizen-oriented review system will result from the present disarray, this accomplishment may be tempered somewhat by recent state legislation limiting the information disclosed by public records. See 1982 Fla. Laws 3175, which amends section 112.533 by ordering the *deletion* of the identities of all witnesses and, most importantly, the officer under scrutiny from the record, where the complaint involved is found to be unsustainable. According to the newly-created subpart (2)(b) of section 112.533, such information may be disclosed to a *citizen* only through the discovery process of an on-going civil suit. This requirement severely limits the citizenry's access to important information concerning police conduct.

91. See *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Thurston v. Dekle*, 531 F.2d

Notwithstanding these shortcomings, Florida courts have valiantly attempted to apply this statute equitably in each fact situation. While the intended purpose of complaint review boards seems to have been conclusively ascertained, questions as to how that objective is to be uniformly implemented remain unanswered.⁹² The period of permissive inactivity has passed; the time is now for legislative relief. Florida's law enforcement officers deserve a clear and meaningful statement of their civil rights.

Anthony J. Carriuolo

1264 (5th Cir. 1976).

92. Without further legislative guidance, uniform civil rights protection for Florida police officers cannot be ensured.

Religious Deprogramming: A Solution Through Judicially Appointed Guardians

Introduction

Conflicts between parents and children concerning values have long been fought. This is exemplified by the religious deprogramming controversy. In recent years children have been breaking with their tradition and joining unorthodox religious cults.¹ Parents, concerned for their children's welfare, have been physically abducting them and subjecting them to religious deprogramming. This process forces the children to relinquish their membership and repudiate their beliefs.

The first section of this note will discuss recruiting techniques and alleged brainwashing practices applied by the cults. The second will analyze and discuss the current self-help method of deprogramming and the cases involving its legality. The third section will recommend and discuss the feasibility of using both the guardianship statutes and the thirteenth amendment's slavery prohibitions as possible solutions to the problems of self-help.

I. Cults, Recruiting and Brainwashing

Religious cults have been under substantial attack by the public recently, due mainly to recruiting techniques² and what has been perceived as their members' zombie-like appearance.³ The underlying issue is the cult's alleged use of brainwashing.

Brainwashing is a term coined to describe the mind-altering tech-

1. This note concerns religious cults such as: The Children of God, The Unification Church, The Church of Armageddon, The International Society of Krishna Consciousness, and others.

2. See *infra* notes 27-31 and accompanying text.

3. See, e.g., Rice, *The Pull of Sun Moon*, N.Y. Times, May 30, 1976, Sunday Magazine, at 8 ("Those who observe Moonies closely often notice a glassy spaced-out look, which, combined with their everlasting smiles, makes them resemble tripped out freaks." *Id.* at 23.).

niques practiced by Koreans with prisoners of war during the Korean Conflict. The fact that this mind-alteration does occur has yet to gain full acceptance in the United States. This was most evident in both the Manson Family⁴ and Patty Hearst⁵ trials. In both cases, the defense contended and the court heard evidence that brainwashing would mitigate liability. The fact that this evidence was accepted indicates that the courts will give some credence to brainwashing even though guilty verdicts were returned in both.

Those who acknowledge the detriments of brainwashing find it reprehensible since it destroys the mind's ability to function under its own will, or to its full capacity.⁶

The criteria established to identify brainwashing include: isolating the person to be brainwashed, severing ties with his past, depriving him of sleep, fatiguing his body, changing his diet, playing on the member's feelings of guilt and shame, changing language, keeping the cults' central beliefs secret from the recruit, and others.⁷

The cults seem to employ most, if not all of these methods. There is evidence indicating that the cults isolate new recruits and do not

4. In the Tate-Labianca murders committed by the Manson Family, Charles "Tex" Watson, tried separately from the rest of the Family, pled not guilty by reason of insanity since "he was simply an unthinking zombie programmed by Charles Manson." V. BUGLIOSI with C. GENTRY, *HELTER SKELTER* 627 (1974). In defense of this claim "Tex" called eight psychiatrists, but the District Attorney's cross-examination showed "Tex" was in "complete command of his mental faculties." *Id.* at 626-27.

5. See, Mathews & Cook, *Patty's Defense*, *NEWSWEEK*, March 1, 1976, at 20; Fraker, Kasindorf & Camper, *What Is Brainwashing?*, *NEWSWEEK*, March 1, 1976, at 31; Mathews, Kasindorf & Cook, *Patty On Trial*, *NEWSWEEK*, Feb. 2, 1976, at 24.

6. See, e.g., Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under The First Amendment*, 51 S. CAL. L. REV. 1 (1977) ("The recruit's impaired intellectual functioning appears to reflect a loss of many I.Q. points. . . ." *Id.* at 14).

7. See, W. SARGANT, *BATTLE FOR THE MIND, A PHYSIOLOGY OF CONVERSION AND BRAINWASHING* (1957) (for an application of Sargant's factors to the Children of God, see REPORT SUBMITTED BY CHARITY FRAUDS BUREAU, FINAL REPORT ON THE ACTIVITIES OF THE CHILDREN OF GOD, To HON. LOUIS J. LEFKOWITZ ATTORNEY GENERAL OF THE STATE OF NEW YORK (1974) [hereinafter cited as FINAL REPORT].); R. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF BRAINWASHING IN CHINA* (1961) (for an application of Lifton's factors to today's religious cults, see C. STONER & J. PARKE, *ALL GOD'S CHILDREN* 172-76 (1977); E. SCHEIN WITH I. SCHNEIER & C. BARKER, *COERCIVE PERSUASION* (1961).

permit them to contact family or friends.⁸ They are often denied the opportunity to read a newspaper.⁹ If parents attempt to see their child, he is often hidden from them.¹⁰ Many cults have their members take on new biblical names to further sever ties with the past.¹¹

Most cults also rely heavily on fatigue and sleep deprivation during both the recruiting and membership periods. Days start before dawn and run till after midnight for the recruit. They are filled with such activities as lectures on theology, calisthenics, sports, chanting and prayer.¹² For the fully-inducted member, it is long days of recruiting and fundraising.¹³

8. See, Rice, *supra* note 3, at 23 ("There is neither time nor opportunity for phoning or writing relatives or friends."). See also, FINAL REPORT, *supra* note 7, at 42 ("Generally, [Children of God] elders intercepted mail addressed to members who either never received it or received it in censored form, with portions deleted. . . .members were required to leave all outgoing mail unsealed for censorship and posting. . . .").

9. One ex-moonie said that "I asked about getting a newspaper and they told me, 'No. Newspapers are full of negativity and are not useful in our life.' I thought that was ridiculous and I said so, but I didn't argue, because it wouldn't have mattered." C. STONER & J. PARKE, *supra* note 7, at 170.

10. See, e.g., FINAL REPORT, *supra* note 7, at 22-23, where one ex-member of the Children of God testified:

They then persuaded me to hide in another loft next door . . . I heard my parents come up and I heard them scream and everything and the cops came—and I stayed there until my parents left the building . . . I heard my mother asking Abram and Ruth where I was and Abram denied by presence at the Children of God and stated I left the Children of God and they did not know where I was.

Id.

11. See, e.g., FINAL REPORT, *supra* note 7, at 24 ("The use of bible names also obviously serves as a new identity for a [Children of God] member, which reinforces the concept of severing all ties, both familial and societal.").

12. See, e.g., Rice, *supra* note 3, at 23. "An exhausting and rigid schedule leaves little time for sleep and none for private reflection. Recruits get a daily dose of six to eight hours of mind-numbing theology based on Moon's 'Divine Principle'." *Id. Accord*, FINAL REPORT, *supra* note 7, at 38. A former member of the Children of God testified: "I was so constantly kept busy the entire time . . . that I didn't have time to think about anything else but what they had planned for me. . . .from the time I got up in the morning until I went to bed at night, which was usually very late." *Id.*

13. See, e.g., Rice, *supra* note 3, at 23-24 ("[Moonies] put in grueling dawn-dusk days recruiting and fundraising."); Kennedy & Kennedy, *The Devil's Work*, PENTHOUSE, March, 1982, at 53 ("I worked alone—no salary either—and spent eigh-

There is also evidence that the cults play on members' feelings of guilt and shame. One ex-member of the Church of Armageddon said

she felt "[l]ike the world's most rotten person. They told me the sores all over my body (scabies caused by mites that bury themselves under the skin and lay eggs there) were caused by my own sinfulness and would go away only when I began to lead a more obedient pure life."¹⁴

This play on guilt and shame drives some members to self-mutilation.¹⁵ It is alleged one member "committed suicide because he didn't consider himself worthy of the Moon cause."¹⁶

Many cults change words and phrases in the recruits' language and quote the bible out of context, making the cultist spend many intensive study hours.¹⁷ In addition, they often keep the central beliefs of their doctrine secret from the recruit to further confuse him.¹⁸

The fact that the cults make use of these methods leading to brainwashing does little to explain how this phenomena occurs. Dissatisfied with previous studies in this respect, Flo Conway and Jim Siegelman, after an extensive four year investigation,¹⁹ sought to explain the physiological effects these factors have on the brain when practiced by the cults. The authors explain that the brain is an information storage device which operates holographically. A holograph is a mathematical

teen hours a day, seven days a week and 365 days a year to get donations for the Unification Church." *Id.* at 52-53.).

14. C. STONER & J. PARKE, *supra* note 7, at 109.

15. Delgado, *supra* note 6, at 16.

16. 122 CONG. REC. H1390, 1392 (1976) (statement of Rep. Wilson) (Representative Wilson read an article previously run in the National Enquirer by Jan Goodwin, *Multimillionaire Minister Woos Children From Their Families To Beg For Him On The Streets*, which quoted New York psychiatrist Dr. Ernest Giovanoli).

17. For example, in the Children of God, "stress is placed upon intensive memorization of selected biblical verses, taken out of context." FINAL REPORT, *supra* note 7, at 29. See also, C. STONER & J. PARKE, *supra* note 7, at 175 ("Each religious cult has created an entire new language and teaches adherents meaning of words in their language.").

18. See, e.g., C. STONER & J. PARKE, *supra* note 7, at 174-75 ("Implicit in this concept is the idea that the cult's resulting laws of morality are absolute, and therefore must be followed automatically." *Id.* at 174.).

19. F. CONWAY & J. SIEGELMAN, SNAPPING (1978).

model to store three-dimensional information in two dimensions photographically, from which the three-dimensional image can be reconstructed.²⁰

The original theorist of the holographic model of the brain, neurologist Karl Pribram, has explained that under this model "we can store things in our brains in terms of various frequencies of information. Then we can read out the information in either linear or spatial fashion. . . . space and time are not in the brain; they are read out of it."²¹

Conway and Siegelman show that experience can alter the brain's basic hologram,²² that which determines how information is read out. Thus, the interplay of the aforementioned criteria which establish brainwashing will cause the brain to have a holographic crisis. At this exact moment, which Conway and Siegelman call the moment of snapping,²³ there will be a "sudden drastic alteration of an individual's entire personality"²⁴ and, "if he remains in an alien setting with little or no connection to his former life . . . his personality will almost certainly be refashioned in the image of his new surroundings, and his awareness . . . with that of people around him."²⁵ "In the wake of snapping the individual's ability to question and to act suffer dramatic impairment. At the same time, he becomes almost wholly vulnerable to suggestion and command."²⁶

This vulnerability to suggestion has been taken to such extremes as killing.²⁷ Who among us can forget Jim Jones leading 900 zombie-

20. *Id.* at 118. See also PRIBRAM, *LANGUAGES OF THE BRAIN: EXPERIMENTAL PARADOXES AND PRINCIPLES IN NEUROPSYCHOLOGY* (1971).

21. F. CONWAY & J. SIEGELMAN, *SNAPPING* 121 (1978) (reporting interview with Karl Pribram).

22. *Id.* at 125-33. This experience comes to the brain in terms of "information". "Deprived of information, the brain ceases functioning normally; starved to extremes it goes altogether haywire." *Id.* at 127.

23. *Id.* at 134.

24. *Id.*

25. *Id.* at 136-37.

26. *Id.* at 155.

27. An ex-member of the Children of God said:

I was told by an older member that if my leaders told me to kill someone, I would have to kill someone, but I hesitated on that and asked them why? . . . He said 'Well, we are not under the law and we are responsible only to our leaders, who are responsible to God for us'.

eyed people to commit suicide in Guyana.²⁸

Many libertarians believe that allowing people to put themselves at the command of others is a price we must pay for living in a free society.²⁹ Critics of the cults may also believe this in principle, but counter that it is the unconsensual nature of the cults' recruiting, and subsequent brainwashing, which they find so offensive.³⁰

Cult recruiters are told to "watch on the streets and campuses for the lonely"³¹ who are considered more prone to suggestion. The recruiter will then act as a loving friend³² just willing to listen, often even

FINAL REPORT, *supra* note 7, at 33.

It was also claimed that the Tate and Labianca murders committed by the Manson Family were a result of Manson's brainwashing the members of his family. See V. BUGLIOSI, *supra* note 4.

28. See, e.g., Mathews with Harper, Fuller & Nater, *The Cult of Death*, NEWSWEEK, Dec. 4, 1978, at 38; N.Y. Times, Nov. 27, 1978, at A1 ("authorities put the final count of the number of dead at the Jonestown Commune at 909").

29. See, e.g., Kelly, *Deprogramming and Religious Liberty*, CIV. LIB. REV., July-Aug. 1977, at 23 ("A part of religious liberty is the right of all of us to make what seem to others to be foolish choices, to be hoodwinked or to be exploited for the sake of what seems to us to be the truth." *Id.* at 31.).

30. This requirement of consent is clearly in line with traditional notions of liberty. As libertarian John Stuart Mill has written:

this then is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

J. S. MILL, *On Liberty!* in JOHN STUART MILL, A SELECTION OF HIS WORKS 16-17 (Robson ed. 1966).

31. C. STONER & J. PARKE, ALL GOD'S CHILDREN 6 (1977) ("[B]ackpack and guitar case were symbols of rootlessness and therefore those carrying them were special targets for recruitment.").

32. See, e.g., *id.* at 6-7.

denying affiliation with the cult.³³

The recruiting process is separated into a number of stages so that even when the recruit gives consent, it is only to the next step in the process.³⁴ "The consequences of the final step are thus concealed until the victim reaches the penultimate stage, at which time he has been 'softened up' to such a degree that committing his life and fortune to the cult seems but a small step."³⁵

II. Brainwashing and the First Amendment: Must They Coexist?

Despite claims that cults practice brainwashing and that resultant harms exist, the cults have claimed that their practices are not subject to interference since they are protected by the first amendment.³⁶

Parents have sought to deny this protection by contending that cults are not "bona fide religious groups [but rather their] primary and motivating purposes are economic and political gain."³⁷ The defendants

33. See, e.g., *id.* at 27 ("[C]ult recruiters may carefully avoid or even deny that the group is a religion.").

34. See, e.g., *id.* at 7 ("[R]ecruits rarely decide to become Moonies. They just evolve into Moonies by putting off the decision.").

35. Delgado, *supra* note 6, at 55. See also, FINAL REPORT, *supra* note 7, at 28 ("This initial period of indoctrination may last up to five days, isolated from all outside influences, and culminates in the new 'convert' . . . signing the 'Revolutionary Sheet'. Here he agrees to turn over all his income, present and future, to the [Children of God] and consents to have his mail opened.").

36. U.S. CONST. amend. I, which provides that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

37. Rankin v. Howard, 527 F. Supp. 976, 977 (D. Ariz. 1981) ("[D]efendants . . . contend that the Unification Church is not a bona fide religious group but that its primary and motivating purposes are economic and political gain.").

This claim is not without factual substance however. As a result of an investigation into the activities of the Children of God by its Charity Frauds Bureau, the New York Attorney General concluded that: "In view of the testimony . . ., one is led to the irresistible presumption that fund gathering by Children of God is largely intended for the personal gain of the leadership and for proselytizing new converts who in turn serve as additional fund gatherers and contributors." FINAL REPORT, *supra* note 7, at 13.

Nor is the Children of God the only cult this practice is associated with. "The average Moonie takes in \$50 to \$200 a day; the more successful can make up to \$500. Every penny is turned in to the team leader who turns it over to the church." Rice, *supra* note 3, at 24. See also, Kennedy & Kennedy, *supra* note 13, at 53 ("When I was

made just such a contention about the Unification Church in the deprogramming case of *Rankin v. Howard*.³⁸ However, the court in *Rankin* found *United States v. Ballard*³⁹ controlling on this issue, and, as such, held that "there can be no inquiry as to whether a religious group is bona fide."⁴⁰ It was in *Ballard*, where Justice Douglas had proclaimed:

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.⁴¹

eighteen, I brought in \$90,000 a year for my church, the Unification Church of Rev. Sun Myung Moon.").

38. 527 F. Supp. 976.

39. 322 U.S. 78 (1944).

40. *Rankin*, 527 F. Supp. at 978. *But see*, *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982), where a former member of the church brought an action against it alleging fraud, intentional infliction of emotional distress, breach of contract, violation of Fair Labor Standards Act, and a class action for treble damages under the Racketeer Influenced and Corrupt Organizations Act. The court said that "[a]lthough we agree that the Free Exercise Clause protects all religions, old and new, alike once its protection attaches, in determining whether that protection applies courts may require a newer faith to demonstrate that it is, in fact, entitled to protection as a religion." *Id.* at 1144. *Compare* *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Supreme Court found the application of Wisconsin's compulsory education laws to Amish children beyond the eighth grade unconstitutional as a violation of the first amendment's free exercise clause *with* *F. & F. v. Duval County*, 273 So. 2d 14 (Fla. 1st Dist. Ct. App. 1973), where the Florida court found that a self-ordained minister of the "Covenant Church of Jesus Christ" could not avoid the state compulsory education laws by teaching his children at home. In *Yoder*, the court drew attention to the fact that the Amish's "religious beliefs and what we would today call 'life style' have not altered in fundamentals for centuries." 406 U.S. at 205. In *F. & F.* on the other hand, the Florida court found the fact that the church was not established in Florida and the lack of the minister to hold services for anyone other than his children to bear on the issue. 273 So. 2d at 18. *See generally*, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

41. *Ballard*, 322 U.S. at 86-87. Although *Ballard* prohibited examination of the truth of one's beliefs, it did permit an examination into whether those beliefs were held in good faith. As such, *Ballard* may be interpreted to allow a determination of whether the cults are bona fide religious groups or economically and politically motivated.

If, then, religion is subject to protection, and it is not open to question whether these cults are religious, can anything be done to alleviate the harms accruing from the brainwashing practices of the cults?

This question has recently faced a number of parents. Upon balancing a perceived harm to their children against the freedom of religion claim, many parents expend great sums of money to have their children abducted and subjected to religious deprogramming.⁴²

42. Deprogramming is a practice whereby the child is kidnapped, taken to a motel room and then a marathon encounter ensues. Ted Patrick, the world-famous deprogrammer, says: "Essentially it's just talk. I talk to the victim, for as long as I have to." T. PATRICK with T. DULACK, *LET OUR CHILDREN GO!* 75 (1976). One of the standard tools used for deprogramming is Chapter 22 in Robert Lifton's book, *Thought Reform and the Psychology of Totalism: A Study of Brainwashing* (*supra* note 7) since it "seems to be written about today's religious cult recruiting and indoctrination practices instead of some far-off Oriental prison camp." C. STONER & J. PARKE, *supra* note 31, at 172. Patrick also claims to make use of the Bible, putting passages the cults took out of context back into context, forcing the child to "read the whole chapter from where it was taken." T. PATRICK, *supra*, at 78.

Patrick does say that "[w]hen a victim is exceptionally vigorous, it may even mean a measure of physical restraint," *Id.* at 75, but, "the child is rarely held in custody by the parents and [Patrick] for longer than three days. Usually it takes Patrick less than one day to deprogram a person. I've managed to do it on occasion in an hour." *Id.* at 76.

But see, LeMoult, *Deprogramming Members of Religious Sects*, 46 *FORDHAM L. REV.* 599 (1978), where he describes deprogramming in a much different light.

The deprogramming process begins with abduction. Often strong men muscle the subject into a car and take him to a place where he is cut off from everyone but his captors. He may be held against his will for upwards of three weeks. Frequently, however, the initial deprogramming only lasts a few days. The subject's sleep is limited and he is told that he will not be released until his beliefs meet his captors' approval. Members of the deprogramming group, as well as members of the family, come into the room where the victim is being held and barrage him with questions and denunciations until he has recanted his newly found religious beliefs.

Id. at 603-04. LeMoult says that deprogramming "is far more like 'brainwashing' than the conversion process by which members join various sects." *Id.* at 606. He especially draws attention to the sudden break that Patrick describes during a deprogramming session (*See* T. PATRICK, *supra* at 79 ("the moment when that happens is always unmistakable")). Compare with F. CONWAY & J. SIEGELMAN, *supra* notes 23-26 and accompanying text.). Patrick counters "I do not brainwash. I ask questions, basically, and I try to show the victim how he has been deceived. Whereas, in the cult indoctrination, everything possible is done to prevent the person from thinking, in deprogramming I do

While a great many of these deprogrammings have freed members from the grips of the cults,⁴³ many which have failed have ended in litigation. In these cases, it has been the children who have brought suit against their parents and deprogrammers, alleging both tort claims and federal civil rights statute violations. These causes of action must be resorted to because the first amendment requires state action, and applies only to Congress and the federal government, or to the states through the due process clause of the fourteenth amendment.⁴⁴ Where parents carry out the deprogramming themselves state action is clearly lacking.⁴⁵

Two recent parental deprogramming cases, both of which turned on the court's belief in the validity of strikingly similar arguments, have come down on opposite sides of the fence. Since the United States Supreme Court has denied certiorari in both cases, it appears unlikely that any uniformity will be developed in the near future.

The first of these cases, *Ward v. Connor*,⁴⁶ upheld a complaint

everything I know how to start him thinking." T. PATRICK, *supra*, at 76.

43. Ted Patrick claims to have "deprogramm[ed] and arranged for deprogramming of over one thousand Americans." T. PATRICK, *supra* note 42, at 37.

44. U.S. CONST. amend. XIV § 1. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause).

45. This is not always true however. Where parents have been using guardianships, there is significant involvement of the judiciary, which has been held to constitute state action. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of a discriminatory restrictive covenant).

Where there has been an overstepping of judicial bounds, suits have been filed under 42 U.S.C. § 1983, for discriminatory conspiracies under color of state law. *See, e.g., Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980) (son sued parents and judge). *See also, Cooper v. Molko*, 512 F. Supp. 563 (N.D. Cal. 1981) (Police officer knew of kidnapping for deprogramming but did not take any action. "Plaintiff has sufficiently alleged state action in violation of § 1983 to sustain a cause of action against Defendant police officers." *Id.* at 568). *But see, Orlando v. Wize*, 443 F. Supp. 744 (W.D. Ark. 1978) ("there is no contention that the parents and [professional deprogrammer] 'conspired' with the State Police or Judge, . . . A state, merely by providing a forum and a means of enforcing regularly issued court orders, does not 'color' the action of private litigants with state action." *Id.* at 748.).

46. 657 F.2d 45 (4th Cir. 1981), *cert. denied*, *Mandelkorn v. Ward*, 455 U.S. 907 (1982). For a complete discussion of *Ward* see Comment, *Civil Rights: A Civil Remedy for Religious Deprogramming Victim under 42 U.S.C. § 1985(3)*, 21 WASHBURN L. J. 663 (1982).

which alleged that parents are liable for conspiring to deprogram their children under 42 U.S.C. section 1985(3).⁴⁷ The second case, *Peterson v. Sorlien*,⁴⁸ found the parents of a member of The Way Ministry not liable for false imprisonment and intentional infliction of emotional distress in their deprogramming attempt. Although the causes of action are different, both cases turned on the level of credence the court gave to the claim that the parents acted out of concern for the well-being of their child.

In *Ward*, the court was confronted with 42 U.S.C. section 1985(3), the Ku Klux Klan Act. This statute was originally enacted in

47. This statute reads:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support to advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C.A. § 1985(3) (West 1981).

48. 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981). For a complete discussion of *Peterson* see Comment, *When parents, or their agents, acting under the conviction that the judgmental capacity of their adult child is impaired, seek to extricate that child from what they reasonably believe to be a religious or pseudo-religious cult, and the child at some juncture assents to the actions in question, limitations upon the child's mobility do not constitute meaningful deprivations of personal liberty sufficient to support a judgment for false imprisonment—Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 101 S. Ct. 1742 (1981), 30 EMORY L.J. 959 (1981).

1871 to stop Ku Klux Klan violence against the newly freed blacks⁴⁹ but little attention was paid to it until 1971, when the case of *Griffin v. Breckenridge*⁵⁰ found state action unnecessary, allowing the statute to reach purely private conspiracies. To find liability the statute requires that the defendants must have conspired for the purpose of depriving the plaintiff "of the equal protection of the laws, or of equal privileges and immunities under the laws."⁵¹ In order to give effect to section 1985(3) yet avoid interpreting it as a general federal tort law, *Griffin* found the statute's language to require a showing of intent—that the defendants acted out of some "class-based, invidiously discriminatory animus."⁵²

To find a deprogramming attempt actionable under section 1985(3), it must be decided whether religious affiliation is the type of class *Griffin* intended to protect. The *Ward* court, in deciding that religion was a protectable class, was confronted with a split of authority. The trial court in *Ward*,⁵³ which was reversed on appeal, had found that the voluntary joining and leaving of a church did not result in the requisite "discrete, insular and immutable characteristics,"⁵⁴ that are

49. See generally, Wildman, 42 U.S.C. § 1985(3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved, 17 SAN DIEGO L. REV. 317 (1980); Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 MINN. L. REV. 635 (1980); Comment, *The Deprogramming of Religious Sect Members: A Private Right of Action Under Section 1985(3)*, 74 N.W. U. L. REV. 229 (1979) [hereinafter cited as Comment, *The Deprogramming of Religious Sect Members*]; Comment, *Civil Rights: A Civil Remedy for Religious Deprogramming Victim under 42 U.S.C. § 1985(3)*, 21 WASHBURN L.J. 663 (1982); Comment, *Civil Rights: A Federal Remedy Against Private Class Discrimination Under 42 U.S.C. § 1985(3) (1970)—Griffin v. Breckenridge*, 403 U.S. 88 (1971), 47 WASH. L. REV. 353 (1972).

50. 403 U.S. 88 (1971). *Griffin* upheld a complaint which allowed blacks from Mississippi to recover under 42 U.S.C. § 1985(3) from a group of white citizens for allegedly conspiring to deprive them of the right to interstate travel, despite the absence of state action.

51. 42 U.S.C.A. § 1985(3) (West 1981).

52. *Griffin*, 403 U.S. at 102.

53. *Ward v. Connor*, 495 F. Supp. 434 (E.D. Va. 1980), *rev'd*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, Mandelkorn v. *Ward*, 455 U.S. 907 (1982).

54. *Ward*, 495 F. Supp. at 437. This test was originally established in *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974), where the court denied relief for discrimination to a member of the Ku Klux

inherent in classifications such as race, national origin and sex.⁵⁵ This point was expressly countered, however, in *Baer v. Baer*,⁵⁶ another parental deprogramming case, where Judge Williams stated that:

While religious status may differ from racial status, because it is not a congenital and inalterable trait, membership in a minority religious group, like membership in a minority racial group, has often excited the fear, hatred and irrationality of the majority. Two thousand years of human history compellingly prove that no easier road to martyrdom is found than in adherence to an unpopular religious faith.⁵⁷

The *Ward* circuit court followed this approach and found religion a protectable class,⁵⁸ under section 1985(3). The mere fact, however, that religion is protectable does not give rise to parental liability for their deprogramming efforts. It must still be shown that the conspiracy was the result of some "invidiously discriminatory animus"⁵⁹ due to membership in this type of religious class.⁶⁰

Several trial courts, including the *Ward* district court, have found this discriminatory animus clearly lacking since "[i]t is readily apparent . . . that defendants were motivated to act . . . by their concern for the well-being of a loved one."⁶¹ These rulings were ignored by the

Klan who lost his job due to his affiliation with that group.

55. *Ward*, 495 F. Supp. at 437.

56. 450 F. Supp. 481 (N.D. Cal. 1978).

57. *Id.* at 491.

58. The *Ward* court based their decision primarily upon the legislative history to the forerunner of § 1985(3), the Civil Rights Act of 1871. The court quoted Senator Edmunds during the debates preceding that statute, where he said: "[I]f in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, . . . then this section could reach it. Cong. Globe, 42d Congress, 1st Sess. 567 (1871)." *Ward*, 657 F.2d at 48.

59. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

60. *Ward*, 657 F.2d 45.

61. *Ward*, 495 F. Supp. at 438. See also, *Weiss v. Patrick*, 453 F. Supp. 717 (D.R.I. 1978) ("In fact, it was shown, and this Court finds, that Defendants' actions were primarily, if not entirely, motivated by the maternal concerns of Plaintiff's mother" *Id.* at 724.); *Styn v. Styn*, No. 79-3468, slip op. at — (N.D. Ill. 1980) ("There is no invidiously discriminatory animus here. Defendants were motivated, not by their

Ward circuit court, which ruled that “the complaint sufficiently charge[d] that the defendants were motivated to act as they did not only because they found the plaintiff’s religious beliefs intolerable, but also because of their animosity towards the members of the Unification Church.”⁶²

This dichotomy of whether parents’ liability emanated from “their concern for the well-being of a loved one”⁶³ or “animosity toward the members of the . . . church”⁶⁴ was settled in favor of a reasonableness standard in a well-reasoned decision by the Supreme Court of Minnesota. In that case, *Peterson v. Sorlien*,⁶⁵ a member of The Way Ministry sued her parents for false imprisonment and intentional infliction of emotional distress for their efforts in deprogramming her. The court denied relief, choosing to establish a reasonableness standard, holding

that when parents or their agents, acting under the conviction that

dislike of a particular religious group, but by concern for the well-being of a family member.” *Id.* at ____).

Although speaking in the context of minor children and compulsory education law the Supreme Court has commented that: “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

62. *Ward*, 657 F.2d at 49. This is in agreement with at least one commentator, who has said:

The fact that the defendants are personally concerned about the plaintiff does not destroy the class-based nature of their animus. There is no specific intent requirement in section 1985(3). Defendants may believe they are doing good and actually helping the plaintiff. However, if their concern is caused by a deep-seated hostility toward the plaintiff’s chosen religion and lifestyle, this seems the very essence of “class-based animus”—a stereotyped view of the class as having no constitutional rights, which inspires the defendant to act illegally and unconstitutionally, as in *Griffin*.

Comment, *The Deprogramming of Religious Sect Members*, *supra* note 49, at 241. *But see*, *Weiss v. Patrick*, 453 F. Supp. at 724 (“[Plaintiff’s] actions which resulted in her combination with Defendants, arose not from her abhorrence of the Unification Church *per se*, but rather arose directly from the solicitude which a mother holds for her daughter’s health and well-being.”).

63. *Ward*, 495 F. Supp. at 438.

64. *Ward*, 657 F.2d at 49.

65. 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).

the judgmental capacity of their adult child is impaired, seek to extricate that child from what they reasonably believe to be a religious or pseudo-religious cult, and the child at some [later] juncture assents to the actions in question, limitations upon the child's mobility do not constitute meaningful deprivations of personal liberty sufficient to support a judgment of false imprisonment.⁶⁶

If brainwashing is to be considered a "public wrong", and deprogramming is necessary to rectify that "wrong", *Peterson* is perhaps a reasonable rule which provides some relief from the problem.

Giving a license to kidnap and deprogram children, however, is a potential "time bomb". The Minnesota Supreme Court recognized this in formulating *Peterson*, cautioning that "owing to the threat that deprogramming poses to public order, we do not endorse self-help as a preferred alternative."⁶⁷

Consider a hypothetical case in which parents kidnap their lesbian daughter and have her raped in an effort to deprogram her of her sexual preferences.⁶⁸ Although these parents would likely be found liable under *Peterson*, the girl was still forced to go through a rape due to what some parents would consider, a parental license to deprogram. "Indeed, according to the Gospel of Mark, Jesus was a candidate for 'deprogramming' since his own family thought he was berserk and his religious leaders said he was possessed of the devil."⁶⁹

66. *Peterson*, 299 N.W.2d at 129. A very similar argument has been used to plead a defense of necessity where the deprogrammer has been charged with kidnapping. See, e.g., *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976), where the district court's rulings were held unreviewable because of double-jeopardy. In that case, the district court found that a parent may legally kidnap an adult child for deprogramming based upon necessity and: "[w]here parents are, as here, of the reasonable belief that they were alone not physically capable of recapturing their daughter from existing, imminent danger, then the defense of necessity transfers or transposes to the constituted agent, the person who acts upon their behalf under such conditions." *Id.* at 145. But see, *People v. Patrick*, 126 Cal. App. 3d 952, 179 Cal. Rptr. 276 (Ct. App. 1981) (necessity defense not allowed in the absence of a showing of an emergency situation and that the agent reasonably believed a need for criminal action existed).

67. *Peterson*, 299 N.W.2d at 129.

68. Although this author has been told such a case has occurred, numerous hours of research have proven fruitless in finding it.

69. H. Cox, *Playing the Devil's Advocate, as it Were*, N.Y. Times, Feb. 16, 1977, at A25, col. 1.

III. Must We Settle for a Reasonableness Standard? Some Suggested Solutions

If the goal of solving the problems inherent in parental deprogramming is to take the power of deciding whether to deprogram away from parents, and put it in the hands of some other decision-making body, then first amendment⁷⁰ obstacles must be overcome.⁷¹

The cults and their supporters claim that freedom to practice their religion is protected by the first amendment. However, if brainwashing is part of their religious practice, should it be similarly protected? The Supreme Court has recognized that not everything associated with the practice of a religion is constitutionally protected. Justice Roberts, speaking for a majority of the Court in *Cantwell v. Connecticut*,⁷² wrote that "[T]he [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the benefit of society."⁷³

Commentaries have been critical of *Peterson* for this reason.

Taken to its logical extreme, . . . if Lutheran parents become upset that their child has converted to Roman Catholicism and has entered a monastery, the parents are justified in extricating the adult child. According to *Peterson*, to avoid liability in such a case, the parents need only confine the child, subject him or her to harangues and threats of commitment to mental institutions or other manner of "persuasion", until the child assents.

Comment, *supra* note 48, at 1004-05.

70. U.S. CONST. amend. I.

71. The first amendment provides "that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *Id.* Besides applying to the federal government, these provisions have been found to apply to the states through the due process clause of the fourteenth amendment as part of "[t]he fundamental concept of liberty embodied in that amendment. . . ." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise clause). *See also*, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (establishment clause).

72. 310 U.S. 296.

73. *Id.* at 303-04. "Thus, religious operations that endanger public safety, threaten disorder, endanger the health of a member, or drastically differ from societal norms may be regulated or prohibited." *Turner v. Unification Church*, 473 F. Supp. 367, 372 (D.R.I. 1978), *aff'd per curiam*, 602 F.2d 458 (1st Cir. 1978). *Accord*, *Prince v. Massachusetts*, 321 U.S. 158 (1943) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the

If a state were to attempt to regulate brainwashing as religious conduct, the regulation "must be so exercised as not, . . . [to] unduly . . . infringe the protected freedom."⁷⁴ Although procedures could be established to strike this delicate balance, there are those who find this unlikely:

If the state were allowed to determine that proselytizing resulting in conversion were really "brainwashing" it would be questioning the validity of a religious experience and thus, as a result, the underlying validity of the religion. It would also be invading the highly protected area of free speech. Such a determination would violate the free exercise, establishment, and free speech clauses of the first amendment.⁷⁵

Since any deprogramming regulation will of necessity encroach upon

latter to ill health or death." *Id.* at 166-67.).

In *Turner*, it was alleged that brainwashing on the part of the Unification Church arose to the level of involuntary servitude (for a complete discussion of this claim see *infra* notes 121 through 144 and accompanying text). The court found that *Cantwell* allowed examination of these claims in view of the fact that it "is unquestionably an act which has a serious adverse effect upon one of the Church's followers and constitutes conduct that violates the most fundamental tenets of both American society and the United States Constitution." *Turner*, 473 F. Supp. at 372.

But can belief and action truly be separated? In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where a challenge was made to that state's compulsory education laws, Chief Justice Burger stated: "This case . . . does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments." *Id.* at 220. This language was later quoted in *Katz v. Superior Court*, 73 Cal. App. 3d 988, 141 Cal. Rptr. 234 (1st Dist. Ct. App. 1977), an action to set aside five conservatorship orders granted for religious deprogramming. The court said further: "When [it] is asked to determine whether that change was induced by faith or by coercive persuasion is it not investigating and questioning the validity of that faith?" *Id.* at 987, 141 Cal. Rptr. at 255. "The total picture disclosed must be tested by principles applicable to the regulation of acts of religious organizations and their members." *Id.* at 988, 141 Cal. Rptr. at 256.

74. *Cantwell*, 310 U.S. at 304.

75. LeMoult, *supra* note 42, at 614. See also, Note, *Conservatorships and Religious Cults: Divining A Theory of Free Exercise*, 53 N.Y.U. L. REV. 1247 (1978) ("A member relies on the sect leaders for guidance and follows their commands unquestioningly due to a belief that the leaders articulate the will of God. That belief is inextricably bound up with the member's will and thought." *Id.* at 1283.).

some first amendment rights, it must be in furtherance of a compelling state interest.⁷⁶ The state has such an interest in promoting the health, safety, and welfare of its citizens.⁷⁷ Deprogramming, in seeking to promote the mental health of brainwashed members by removing the effects of brainwashing, is just such an interest. Further, if brainwashing has induced self-mutilation,⁷⁸ murder⁷⁹ and mass-suicide⁸⁰ can anyone truly say that it is not in the states' interest to regulate such activity?

If governmental regulations were made applicable to deprogramming, it would put the government in a position of *forcing* a person to accept treatment against his will. Doesn't each individual, however, have the right to do with his own body as he sees fit? While this right does exist as part of the right to privacy,⁸¹ it is not absolute.⁸² Since

76. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1962); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) ("[T]he state may abridge religious practices only upon a demonstration that some compelling state interest outweighs the defendants' interests in religious freedom." *Id.* at 718, 394 P.2d at 815, 40 Cal. Rptr. at 71.).

77. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination laws). See also, *Roe v. Wade*, 410 U.S. 113 (1973) ("State's important, and legitimate interest in the health of the mother, the 'compelling' point in the light of present medical knowledge is at approximately the end of the first trimester. . . . [F]rom and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* at 163.).

78. See *supra* note 15 and accompanying text.

79. See FINAL REPORT, *supra* note 27 ("I was told by an older member that if my leaders told me to kill someone, I would have to kill someone." *Id.* at 33.).

80. Mathews, *supra* note 28 (Jonestown slayings).

81. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (mother has a right before viability to decide whether to have an abortion); *Guardianship of Roe*, — Mass. —, 421 N.W.2d 40 (1981) ("competent individual has the right to refuse . . . treatment." *Id.* at —, 421 N.W.2d at 51.); *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) ("[Constitutional right of privacy] is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions." *Id.* at 40, 355 A.2d 663.), *cert. denied*, 429 U.S. 922 (1976); *Satz v. Perlmuter*, 362 So. 2d 160 (Fla. 4th Dist. Ct. App. 1978) (competent terminal patient has a right to refuse extraordinary treatment as part of his constitutional right of privacy), *approved*, 379 So. 2d 359 (Fla. 1980) ("[C]ompetent adult patient, with no minor dependents, suffering from a terminal illness has the constitutional right to refuse or discontinue extraordinary medical treatment where all effected family members con-

this right has been held to be a fundamental one,⁸³ however, a compelling governmental interest must be shown before it can be intruded upon.⁸⁴ Here too, this compelling interest is the promotion of the health, safety and welfare of its citizens.

Since the claim of brainwashing assumes the person is unaware he's been brainwashed, would such a person be in a position to decide if he should be treated by deprogramming to have this condition removed, or is he incompetent to rationally reach such a decision? While incompetence is generally thought of as the result of age, disease or infir-

sent." *Id.* at 360.).

The privilege of privacy is extremely important for both the individual and society. It is necessary for individuality and the consciousness of individual choice in life. Without solitude, which allows one to know what he thinks and feels, the individual cannot achieve more than a primitive sense of self. Independence and personal strength, as well as the diversity of thought that arises from nonconformity, are desirable traits in a social system. They result in leadership and creative surges that are essential for social progress. Moreover, by enabling an individual to maintain degrees of intimacy and distance, privacy is an integral aspect of personal liberty, freedom and dignity. It places the individual in control of his own destiny, thus allowing him to maximize his own creativity and desires. The meaning of love, trust, and friendship are enhanced when the individual is able to make his own decisions. Privacy both promotes purity of individual decisions regarding the nature of one's relationships and assures that these relationships are maintained.

A. SLABY & L. TANCREDI, COLLUSION FOR CONFORMITY 34 (1975).

82. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (after viability, state can proscribe abortion); *Schmerber v. California*, 384 U.S. 757 (1966) (blood withdrawal to analyze alcohol content despite verbal refusal); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization of inmates who have a hereditary form of insanity or imbecility); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination). But see, *Rochin v. California*, 342 U.S. 165 (1952) (compulsory stomach pumping to search for drugs found violation of due process as "conduct that shocks the conscience" *Id.* at 172.).

83. See, e.g., *Wade*, 410 U.S. at 155; *Doe v. Bolton*, 410 U.S. 179 (1973) ("[The freedom to care for one's health and person,] though fundamental, [is] likewise subject to regulation on a showing of 'compelling state interest'." *Id.* at 213. (Douglas, J., concurring)).

84. See, e.g., *Wade*, 410 U.S. 113. See also, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (fundamental right to travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (fundamental right to marry); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (freedom of religion).

mity,⁸⁵ can the physiological effects of brainwashing be much different?⁸⁶

The Supreme Court has held that to confine a non-dangerous mental incompetent without treatment is unconstitutional as a violation of due process.⁸⁷ The Court has yet to determine, however, whether a non-dangerous mental incompetent is denied due process if treated against his will.

The United States Supreme Court was asked, in *Mills v. Rogers*,⁸⁸ to determine whether "an involuntarily committed mental patient has a constitutional right to refuse treatment"⁸⁹ The Court vacated the judgment of the Circuit Court of Appeals⁹⁰ and remanded the case for further proceedings⁹¹ to determine what effect an intervening Supreme Judicial Court of Massachusetts opinion, *Guardianship of Roe*,⁹² might have on the case.⁹³ The Court's decision to remand was based upon the fact that "it is distinctly possible that [the state] recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States."⁹⁴ In re-

85. See, e.g., *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982) ("When using the terms 'mentally incompetent', 'incompetent' and 'incapable' . . . , these are defined as including one who is not adjudicated insane but, because of old age, disease, weakness of mind or other reasons, is unable without assistance to adequately care for his person or property and, therefore could be deceived by artful or designing persons." *Id.* at 1351.), *cert. denied*, 51 U.S.L.W. 3533 (Jan. 18, 1983). See generally 41 AM. JUR. 2D *Incompetent Persons* § 1-7 (1968).

86. But see, *LeMoult*, *supra* note 42. "One would search in vain to find 'brainwashed zombies' listed in any of the standard texts on mental disorders." *Id.* at 630.

87. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The Supreme Court has also held that "[t]he mere fact that [a person] has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment." *Youngberg v. Romeo*, 102 S. Ct. 2452, 2458 (1982). "Respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably non-restrictive confinement conditions, and such training as may be required by these interests." *Id.* at 2463.

88. 102 S. Ct. 2442 (1982).

89. *Mills*, at 2448.

90. *Id.* at 2452.

91. *Id.*

92. — Mass. —, 421 N.E.2d 40 (1981).

93. *Mills*, at 2452.

94. *Id.* at 2450.

gard to those rights protected by Massachusetts' laws, the Court found this so "[e]specially in the wake of [*Guardianship of Roe*]."⁹⁵ As such, it appears the Court is tacitly approving *Guardianship of Roe* as having met at least minimal due process standards.

Guardianship of Roe involved the forcible treatment of a non-institutionalized incompetent with anti-psychotic drugs. The court began their inquiry with the precept that "[a]bsent an overwhelming State interest, a competent individual has the right to refuse . . . treatment."⁹⁶ The court held that this right was not lost due to incompetence, but rather the question was: who may exercise it?

The court found the following factors to weigh heavily in its decision that "in order to accord proper respect to this basic right of all individuals . . . a judicial determination of substituted judgment must be sought."⁹⁷ A determination of substituted judgment would require the courts to decide what "that" person *would* do if given the choice, as opposed to the court deciding what they think "that" person *should* do.⁹⁸ Those factors the court relied upon in reaching this decision were:

95. *Id.* at 2450.

96. *Guardianship of Roe*, at —, 421 N.E.2d at 51. While a competent individual can refuse treatment, incompetent individuals have even been denied the opportunity to consent in extreme situations. See *Kaimowitz v. Michigan Dept. of Mental Health*, 42 U.S.L.W. 2063 (Cir. Ct. Wayne Cty., Mich., July 31, 1973), where it was held that "involuntarily detained mental patients cannot give informed and adequate consent to experimental psychosurgical procedures on the brain." *Id.* at 2064.

97. *Guardianship of Roe*, at —, 421 N.E.2d at 51-52.

98. The Massachusetts court

emphasize[d] that, the determination is *not* what is medically in the ward's best interests—a determination better left to those with extensive medical training and experience. The determination of what the incompetent individual would do if competent will probe the incompetent individual's values and preferences and such an inquiry in a case involving anti-psychotic drugs is best made in courts of competent jurisdiction.

Id. at 52 (emphasis original). But see, *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982) ("[T]here certainly is no reason to think judges or juries are better qualified than appropriate professionals in making [treatment] decisions." *Id.* at 2462.).

This dichotomy has been exemplified by the terminally ill "right to die" cases. In *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), the highly publicized case where a 22 year old girl, Karen Quinlan, was in a comatose state and her parents sought to have her removed from a life supporting respirator, the Supreme Court of New Jersey held:

“(1) the intrusiveness of the proposed treatment, (2) the possibility of adverse side effects, (3) the absence of an emergency, (4) the nature and extent of prior judicial involvement, and (5) the likelihood of conflicting interests.”⁹⁹ Applying these factors to religious deprogramming, we see that: the intrusions to both liberty and first amendment freedom of religion are great;¹⁰⁰ there is a substantial possibility of harm if the wrong person is deprogrammed since deprogramming is trying to effect

Upon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital "Ethics Committee" or like body of the institution in which Karen is then hospitalized. If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician, hospital or others.

Id. at 54, 355 A.2d at 671. *But see*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977), where the Supreme Judicial Court of Massachusetts rejected the *Quinlan* "Ethics Committee" approach, taking "a dim view of any attempt to shift the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction. . . ." *Id.* at 758, 370 N.E.2d at 434. The court went further, saying that "such questions . . . require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created." *Id.* at 759, 370 N.E.2d at 435. As such, the court held a judicial determination of substituted judgment was necessary.

99. Guardianship of Roe, at —, 421 N.E.2d at 52. The court gave a number of additional factors which also were considered:

Among them are at least the following: the extent of impairment of the patient's mental faculties, whether the patient is in the custody of a State institution, the prognosis with the proposed treatment, the complexity, risk and novelty of the proposed treatment, its possible side effects, the patient's level of understanding and probable reaction, the urgency of decision, the consent of the patient, spouse, or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institution involved.

Id. (quoting Matter of Spring, — Mass. —, 405 N.E.2d 115, 121 (1980)).

100. *See supra* notes 36-41, 70-80 and accompanying texts (first amendment); and notes 81-103 and accompanying text (liberty).

thought processes and holographic patterns of the brain;¹⁰¹ deprogramming does not arise in an emergency setting since members have usually been with the cult for a period of time;¹⁰² and finally, conflicting interests such as freedom of religion are great.¹⁰³ Consequently, it seems likely that, for decisions determining whether to deprogram, the criteria set forth in *Guardianship of Roe* would require a judicial determination of substituted judgment. The court in *Guardianship of Roe*, however, did not decide that anyone could be treated where a judicial determination was made. In that case, a guardian had previously been appointed so that there was already an adjudication of incompetence.

Guardianship Statutes

The application of guardianship statutes to deprogramming has been advocated by many.¹⁰⁴ This approach permits parents to petition a court to be appointed as guardians for deprogramming purposes and the court can then determine what, if any, treatment should take place. The success of obtaining court appointed guardianships, however, varies because different states require different standards of incompetence to be met before a guardian will be appointed.

This was exemplified in two recent cases. In California, the case of *Katz v. Superior Court*¹⁰⁵ overturned the trial court's orders which had granted guardianships to the parents of five members of the Unification Church for deprogramming purposes. The court found that under the applicable state statutes, "in the absence of such actions as render the adult believer himself gravely disabled . . . , the processes of this state

101. See *supra* notes 19-28 and accompanying text.

102. See, e.g., *People v. Patrick*, 126 Cal. App. 3d 952, ___, 179 Cal. Rptr. 276, 282 (Ct. App. 1981) (Necessity defense was not allowed in the absence of an emergency. "After some seven years of alleged cult membership, any imminent harm threatening [the member], if it existed at all, was of a character not justifying the violent action undertaken by the [Parents] with Patrick's help.").

103. See *supra* notes 36-41, 70-80 and accompanying texts.

104. See, e.g., Delgado, *supra* note 6, at 88. In California, guardianship orders were obtained for five members of the Unification Church, although they were later set aside. See *Katz v. Superior Court*, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1st Dist. Ct. App. 1977).

105. 73 Cal. App. 3d 952, 141 Cal. Rptr. 234.

cannot be used to deprive the believer of his freedom of action and to subject him to involuntary treatment."¹⁰⁶

In Oklahoma, where the standard to be applied is whether "the alleged incompetent is incapable of 'taking care of himself and managing his own property',"¹⁰⁷ the Tenth Circuit Court of Appeals, in *Taylor v. Gilmartin*,¹⁰⁸ found the issuance of conservatorship orders to parents for deprogramming improper. In that case, it was the failure to follow proper procedure and to produce evidence showing incompetency which were at fault. It is entirely possible that if these circumstances were different, the conservatorship would have been upheld.

If a state does not have a guardianship statute applicable to deprogramming, its legislature should consider enacting one. Despite the obstacles posed by the first amendment¹⁰⁹ and the due process clause's right to refuse treatment,¹¹⁰ a deprogramming statute would be less intrusive than allowing parents to engage in self-help¹¹¹ and less offensive than requiring a brainwashed person to remain that way.

If such a statute were enacted, procedural safeguards must be included so that it would not violate due process. Although "due process is flexible and calls for such procedural protections as the particular situation demands,"¹¹²

[w]hen the state participates in deprivation of a person's right to personal liberty . . . at a minimum, due process requires that the person receive a hearing after adequate written notice of the basis for the proposed action; an opportunity to appear in person and to present evidence in his own behalf; the right to confrontation by, and the opportunity to cross-examine, adverse witnesses; a neutral and detached decision maker; findings by a preponderance of the evidence and a record of the proceeding adequate to permit meaningful judicial or appellate review.¹¹³

106. *Id.* at 988-89, 141 Cal. Rptr. at 256.

107. *Taylor v. Gilmartin*, 686 F.2d 1346, 1351 (10th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3533 (Jan. 18, 1983).

108. *Id.*

109. *See supra* notes 36-41, 70-80 and accompanying texts.

110. *See supra* notes 81-103 and accompanying text.

111. *See supra* notes 42-69 and accompanying text.

112. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

113. *In re Roger S.*, 19 Cal. 3d 921, 937-38, 569 P.2d 1286, 1296, 141 Cal.

These safeguards are in line with the goals a deprogramming statute would seek to achieve—the undoing of unconsensual brainwashing and minimal intrusiveness to personal liberty.

At the proceedings, the judge questions the victim, observes his demeanor and hears psychiatric testimony. If conservatorship orders issue, they spell out the powers of the parent or conservator, including the location and type of any treatment to be given. The treatment proceeds, under the supervision of the court, which may question the treating physician, observe progress or order the treatment discontinued.¹¹⁴

In *Guardianship of Roe*, the Massachusetts court recognized the serious impact of deciding whether to treat a person against his will. The court therefore “set forth . . . guidelines to be followed in order to ensure accuracy and consistency in [such] proceedings. . . .”¹¹⁵

(1) *The ward's expressed preferences regarding treatment.* . . .
Even if the ward lacks capacity to make treatment decisions, his stated preference is entitled to serious consideration. . . .

. . . .

Rptr. 298, 308 (1977). See also, *Guardianship of Roe*, — Mass. —, —, 421 N.E.2d 40, 47 (1981) (“[P]reponderance of the evidence standard is the appropriate standard to be applied . . . a conscientious judge, being mindful of the adverse social consequences which might follow an adjudication of mental illness, will subject an individual to guardianship only after carefully considering the evidence and indicating those factors that persuade him.”). But see, *Addington v. Texas*, 441 U.S. 418 (1979) (civil involuntary commitment for an indefinite period of time requires “clear and convincing” level of proof).

114. Delgado, *supra* note 6, at 91.

115. *Guardianship of Roe*, at —, 421 N.E.2d at 61. Such guidelines are necessary considering the implications of extraordinary treatment:

The awesome moral problem of these treatments is confused by the fact that the individuals so treated may in most cases be incapable of objecting to the treatment after it has occurred. In his altered state, the patient is pleasant and happy; he has no recollection of his prior condition and is therefore incapable of asserting any objections he might have to the treatment, be they physical, philosophical, or recalcitrant. The new personality is reformed and even artificial, almost as if a new soul had been transplanted into an old body.

N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 388 (1971).

- (2) *The ward's religious beliefs.* . . .

- (3) *The impact upon the ward's family.* . . .

- (4) *The probability of adverse side effects.* . . .

- (5) *The consequences if treatment is refused.* . . .

- (6) *The prognosis with treatment.* . . .¹¹⁶

These factors should facilitate deprogramming efforts while prohibiting society from imposing upon both religious rights protected by the first amendment and the member's right to privacy. "In short, if an individual would, if competent, make an unwise or foolish decision, the judge must respect that decision as long as he would accept the same decision if made by a competent individual in the same circumstances."¹¹⁷

Despite such procedural safeguards, deceptive practices of the cults might render any action impossible. In view of these deceptive practices, the deliberate hiding of members from their parents¹¹⁸ and the total disregard of the law by some of the cults,¹¹⁹ many advocate an ex-parte hearing to ensure that guardianship orders are issued. Considering the intrusions of an ex-parte order to personal liberty it is recommended that a two-stage proceeding be adopted. The first stage could

116. Guardianship of Roe, at __, 421 N.E.2d at 57-58.

117. *Id.* at __, 421 N.E.2d at 60 n.20.

118. One ex-member of the Children of God has testified:

They then persuaded me to hide in another loft next door . . . I heard my parents come up and I heard them scream and everything and the cops came—and I stayed there until my parents left the building . . . I heard my mother asking Abram and Ruth where I was and Abram denied my presence at the Children of God and stated I left the Children of God and they did not know where I was.

FINAL REPORT, *supra* note 7, at 22-23 ("Our files are replete with the testimony of parents and ex-members of similar incidents." *Id.* at 23.).

119. For instance, a "Moses Letter" entitled "Public Relations" which is used by the Children of God for leadership training, proclaimed: "You can ask to see the warrant—make sure who it's for, and while you are stalling, someone else can inform the disciple involved who then has a perfect right to run out the back door if he wants to." FINAL REPORT, *supra* note 7, at 16.

be a "probable cause" ex-parte hearing to bring the member within the jurisdiction of the court. The cults could then be legally compelled to produce the member at the second stage. It is at this second-stage proceeding where the court can determine if guardianship orders shall be issued. If the court does issue such orders, then a later additional proceeding would be required, after all the evidence is in, to determine whether to permit the deprogramming.

In view of the fact that "due process is flexible"¹²⁰ and depends upon the situation, an initial ex-parte hearing to confer jurisdiction should not be violative. The state interests in alleviating brainwashing and thereby promoting the health, safety and welfare of its citizens should substantially outweigh the inconvenience that would accrue to a member not in need of deprogramming by making him appear in court.¹²¹

120. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

121. Such a balancing of interests is the test usually applied to procedural due process questions. The test was given in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. This language was later quoted in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) and *Parham v. J. R.*, 442 U.S. 584 (1979).

In *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Penn. 1975), *vacated*, 431 U.S. 119 (1976), a balancing of state against individual interests led the court to mandate a civil probable cause hearing within 72 hours of commitment of minors. While the case was vacated as moot, due to an intervening legislative change, a similar balancing of interests should permit the court to take jurisdiction before a decision of whether to deprogram is made.

Such a system has already been used for deprogramming. *See Religious Cults Newest Magnet for Youth*, U.S. NEWS AND WORLD REPORT, June 14, 1976, at 52 ("On at least one occasion, sheriff's deputies have gone out in the pre-dawn hours to pick up the person, so the commune does not have time to spirit him away." *Id.* at 54.).

Thirteenth Amendment's Slavery Prohibitions

A blanket approach might be developed to effectively prevent brainwashing. As a result of a Grand Jury investigation, the People of the State of New York, in *People v. Murphy*,¹²² charged two leaders of the Hare Krishna movement with *unlawful imprisonment*. The basis for this charge was that:

through "mind control", brainwashing, and/or "manipulation of mental processes" the defendants destroyed the free will of the alleged victims, obtaining over them mind control to the point of absolute domination. . . .¹²³

While the charge was dismissed "on the ground of insufficient legal evidence"¹²⁴ it is possible that the argument was proper but that instead of *unlawful imprisonment*, the charge should have been thirteenth amendment slavery violations.¹²⁵

If the New York District Attorney, and others, are correct in claiming that brainwashing gives such "control to the point of absolute domination"¹²⁶—is this not slavery? Compare this basis for the New York case with the modern definition of slavery given in *United States v. Ingalls*:¹²⁷

A slave is a person who is wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another and who is in a state of compulsory service to another.¹²⁸

Professor Richard Delgado has found a number of similarities between the cults' practices and those practices which previous courts

122. 98 Misc. 2d 235, 413 N.Y.S.2d 540 (N.Y. Sup. Ct. 1977).

123. *Id.* at 239-40, 413 N.Y.S.2d at 543.

124. *Id.* at 243, 413 N.Y.S.2d at 545-46.

125. U.S. CONST. amend. XIII, § 1, which provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime . . . , shall exist within the United States. . . ." *Id.* For a complete discussion of this claim, see Delgado, *Religious Totalism As Slavery*, 9 N.Y.U. REV. L. & SOC. CHANGE 51 (1980).

126. *Murphy*, at 239-40, 413 N.Y.S.2d at 543.

127. 73 F. Supp. 76 (S.D. Cal. 1947).

128. *Id.* at 78.

have found give rise to a thirteenth amendment claim. For example,

Cultists often are recruited by force and deception, then removed to isolated surroundings from which escape is difficult. . . . Doubts, "improper" thoughts, or insufficient fund-raising may be punished by forcing the recruit to "pay indemnity" and undergo physical self-mortification. . . .

. . . .
 . . . Work assignments are made by the leaders, who control every detail of the convert's life, including residence, meals, hours of sleep, even choice of marital partner. . . . Recruits work 12-14 hour work days, seven days a week. All the proceeds are turned over to the cult leaders. . . .¹²⁹

Courts have found combinations of the following practices to constitute slavery: maintaining farm and field hands with little chance of escape by charging exorbitant expense charges for food and rent which were set against their pay,¹³⁰ threatening to disclose a thirty-eight year old morals charge to authorities,¹³¹ threatening violence,¹³² insufficient food,¹³³ and long hours.¹³⁴

It is clear that at least for involuntary servitude, "the law takes no account of the means of coercion,"¹³⁵ so that brainwashing, if sufficiently proven, may well be enough to constitute slavery. If this charge

129. Delgado, *supra* note 125, at 58-59.

130. *See* United States v. Booker, 655 F.2d 562 (1st Cir. 1981); United States v. Bibb, 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

131. *Ingalls*, 73 F. Supp. at 77 (defendant threatened to have slave committed to prison because of adultery and an abortion 38 years ago).

132. *Bibb*, 564 F.2d at 1168 ("Each victim testified that he did not leave Ivory Lee Wilson's employ because he feared that he would be physically harmed by the defendants."). *See Booker*, 655 F.2d 562 (defendants were severely beaten).

133. *Bibb*, 564 F.2d at 1168 ("There is evidence that the food furnished to her by defendant was of substantially lower standard than that common to servants generally.").

134. *Id.*

135. *Id.* at 1167-68 ("Various combinations of physical violence and of threats of physical violence for escape attempts are sufficient"); *Bernal v. United States*, 241 F. 339 (5th Cir. 1917) ("The law takes no account of the amount of the debt or the means of coercion." *Id.* at 342.), *cert. denied*, 245 U.S. 672 (1918); *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945), *reh'g denied*, 157 F.2d 848 (5th Cir. 1946), *cert. denied*, 329 U.S. 814 (1947).

of slavery were to be accepted, the cult could not claim protection of its practices by the first amendment. In *Turner v. Unification Church*,¹³⁶ the Unification Church made just such a claim in defense of an ex-member's charge of involuntary servitude. The court responded:

The alleged involuntary servitude is unquestionably an act which has a serious adverse effect upon one of the church's followers and constitutes conduct that violates the most fundamental tenets of both American society and the United States Constitution. The Unification Church cannot seek the protection of one constitutional amendment while it allegedly deprives citizens the protection of other constitutional guarantees.¹³⁷

The plaintiff's claim was eventually dismissed, as a claim upon which relief could not be granted.¹³⁸ The problem was that rather than asking to be released from a state of involuntary servitude, the plaintiff asked for damages for a previously terminated servitudinal relationship.

Professor Delgado, who originally espoused use of a thirteenth amendment claim, found the amendment's categorical approach most appealing. "[I]f a particular practice constitutes slavery, it is prohibited,"¹³⁹ so that, "one need not show that the slaves are unhealthy, incompetent, or in danger of becoming insane; it is enough to show that they are slaves."¹⁴⁰ While this approach provides an easy method to attack brainwashing, and therefore the cults, it completely overlooks the individual's right to privacy and his first amendment right to freely practice the religion of his choice.

Moreover, the claim that mind control is a form of slavery under the thirteenth amendment is based upon the supposition that brainwashing, a psychological concept, renders the victim subject to the master's control. To use Delgado's theory that we no longer have to show incompetency or unhealthiness due to the thirteenth amendment's categorical approach would be to use flawed reasoning. This is so because brainwashing presupposes incompetency or lack of health. Were

136. 473 F. Supp. 367 (D.R.I. 1978).

137. *Id.* at 372.

138. *Id.* at 375-76.

139. Delgado, *supra* note 125, at 53.

140. *Id.* at 55.

it otherwise, we could not explain how the slaves were compelled to be slaves since there was no physical compulsion.

Professor Delgado seeks use of the thirteen amendment to effectuate his own ideals. As he himself writes: "The thirteenth amendment's prohibition of human bondage offers a method by which our instinctive reaction to such cases can be made legally cognizable. Our intuitions should respond to fundamental notions about the way in which we, as a society, wish to live. We do not want slavery."¹⁴¹ Although we do not want the cults to use brainwashing techniques, can we allow our intuitions to get the better of us? We must respect the first amendment freedoms¹⁴² and the individual's right to privacy.¹⁴³ While brainwashing will not be protected under either of these constitutional guarantees, the Constitution demands that this brainwashing be fully proven before we send a "lynch mob" after the cults.

Instead of seeking to use the thirteenth amendment in a vacuum to rectify brainwashing by the cults, it seems far more palatable to use the policies against slavery as a further compelling state interest to overcome both the first amendment and right to privacy obstacles in using guardianship-type statutes, thus more fully protecting individual freedoms.

Present remedies have proven insufficient to prevent the use of brainwashing techniques and have only provided relief after the fact. If claims of slavery are proven the thirteenth amendment's enforcement statutes¹⁴⁴ provide penal sanctions which should deter cults from using such techniques in the future, thus buttressing the guardianship and deprogramming post hoc solutions.

Conclusion

There is persuasive evidence that religious cults brainwash their members. This, combined with deception in the recruiting phase, raises a strong doubt as to whether these members are exercising their free will. This brainwashing may actually constitute a form of slavery.

Parents, distressed over seeing their loved ones in such a state, find

141. *Id.* at 61.

142. *See supra* notes 36-41, 70-80 and accompanying texts.

143. *See supra* notes 81-103 and accompanying text.

144. These include 18 U.S.C.A. §§ 1581-87 (West 1976).

themselves in a dilemma. Should they take action on their own, attempting a rescue, or should they stand idly by as their child deteriorates? A number of parents have chosen self-help, kidnapping and deprogramming their children at the risk of being held liable for depriving their child of his civil rights.

Recognizing the parents' dilemma, the Supreme Court of Minnesota adopted a reasonableness standard, under which parents cannot unconditionally kidnap their children. The parents, to avoid liability, must have acted upon a reasonable belief that deprogramming was necessary. In view of the child's civil rights, and the fact that parents are unlikely to be able to objectively evaluate whether their actions are reasonable, it is far better to take the power to decide such a course of action from the parent and vest it in the judiciary. The court can weigh all sides and the child is provided the opportunity to be heard. If the court does determine that deprogramming will take place, it will set the parameters. This can best be effectuated through use of guardianship-type statutes. Moreover the thirteenth amendment's enforcement statutes can provide penal sanctions against cult leaders if slavery by brainwashing is proven.

Ira Jason Schacter

Eleventh Circuit Rejects Claim of Florida Death Row Inmates: *Ford v. Strickland*.

Introduction

In *Ford v. Strickland*,¹ issued January 7, 1983, a divided United States Court of Appeals for the Eleventh Circuit affirmed the death sentence of Alvin Bernard Ford, condemned for killing a Fort Lauderdale police officer.² Its ruling swept aside a major legal barrier to the execution of Ford and 122 other death row inmates, who claimed that the Florida Supreme Court violated their constitutional rights by reading secret psychological reports during its review of their sentences.³ The 123 inmates first challenged this practice in a 1980 state court lawsuit, *Brown v. Wainwright*.⁴ In deciding that case, the Florida Supreme Court denied any wrongdoing and refused to vacate their death sentences. The United States Supreme Court, which still may ultimately decide the issue, declined to hear *Brown* in November, 1981.⁵

1. 696 F.2d 804 (11th Cir. 1983) (en banc).

2. While the habeas corpus petition filed by Ford and the Eleventh Circuit's opinion concern seven issues in all, this comment will be restricted in scope to the issue designated as "I" by the court of appeals.

3. That the justices did in fact engage in the practice complained of seems overwhelmingly clear. According to an article in *AMERICAN LAWYER* magazine, the practice was unearthed by public defenders in 1978, who found during oral argument that they were being challenged on information that the justices had received *ex parte*. Cramer, *Florida Supreme Court Declares Itself Not Guilty*, *AM. LAW.*, Apr. 1981, at 24. "But nothing was made public until August, 1980 when . . . the *St. Petersburg Times* reported that the justices had seen profiles of at least 20 men who were waiting on death row for the court to review their sentences." *Id.* at 25. Closely following this report was the confirmation by a justices' law clerk "that in 1978 she shredded 30 reports on the advice of another clerk." *Id.* Ford's brief to the Eleventh Circuit charges that a purge took place, and this allegation was not controverted. Brief for Petitioner-Appellant at 57,59, *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982) [hereinafter cited as Brief for Petitioner-Appellant].

4. 392 So. 2d 1327 (Fla. 1981, *cert. denied*, 454 U.S. 1000 (1981)).

5. 454 U.S. 1000 (1981). The order denying certiorari in *Brown* was issued on Nov. 2, 1981. Just two days later, a death warrant was signed for Ford. Since Ford was

Ford was scheduled to die on December 8, 1981, when the Eleventh Circuit granted a stay of execution less than fourteen hours before the sentence was to be carried out. Through his appeal, the so-called *Brown* issue reached a federal appellate court for the first time. Had the federal court ruled in his favor, the death sentences of nearly two-thirds of Florida's 201 condemned inmates might have been invalidated. Ford's request that he be allowed to prove his allegations through evidentiary proceedings further posed the specter of summoning sitting Florida Supreme Court justices, by federal subpoena, for examination regarding their motives and use of the controversial material. A victory for Ford would have dealt a staggering blow to the credibility of Florida's highest court and its overburdened appellate system.

Last April, a three-judge panel of the Eleventh Circuit upheld Ford's sentence,⁶ finding "not an iota of evidence"⁷ that the Florida justices considered any secret material in his case. The full court then agreed to rehear his case, indicating that its resolution of *Ford* would dispose of all similar pending appeals by the other affected inmates. The six to five decision⁸ in the State's favor reflects recent, conservative trends in federal-state relations and evidences the Eleventh Circuit's reluctance to disregard the Florida Supreme Court's disclaimer in *Brown*. Most significantly, the *Ford* ruling moves many death row inmates closer to execution, since *Brown* was the final issue being raised in their appeals.

Origin of the Issue: *Brown v. Wainwright*

In the fall of 1980, 123 convicted murderers, at that time comprising nearly all of Florida's death row population, petitioned the Florida Supreme Court for relief from allegedly unconstitutional death sentences.⁹ The prisoners' petition alleged that, for a number of years,

a petitioner in *Brown*, he became the first to satisfy exhaustion requirements and be eligible to raise the claim in his individual habeas corpus action.

6. *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982).

7. *Id.* at 444.

8. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983) (en banc).

9. *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981), *cert. denied*, 454 U.S. 1000 (1981). The name of convicted murderer Joseph Brown appeared first on the petition and, since the Florida Supreme Court declined to acknowledge a class habeas

the Florida Supreme Court systematically “‘engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal.’”¹⁰ Documented by transmittal letters to Starke Prison requesting that confidential reports be sent directly to the Florida Supreme Court, the suit charged the court with improperly reviewing “pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by prison personnel.”¹¹ Assuming their truth, the allegations in *Brown* exposed a practice unique to Florida and questionable from a constitutional perspective. By reviewing these reports on an *ex parte* basis, without allowing defense counsel an opportunity to examine or challenge their contents, the Florida Supreme Court may have violated a United States Supreme Court decision, *Gardner v. Florida*,¹² relating to proper standards for sentencing in capital cases, and denied due process rights of individual prisoners.

In the Florida Supreme Court’s view, the *Brown* petitioners “contend[ed] that our alleged misconduct requires our invalidation of all death sentences imposed or approved in Florida, and by necessary implication, that we declare Florida’s death penalty statute invalid and unconstitutional in its operation.”¹³

A. The Florida Supreme Court’s Disclaimer

The acrimonious manner in which the Florida Supreme Court attacked the suit in their ruling demonstrates how deeply rankled the justices were by the prisoners’ accusations. First, even though the peti-

corpus action, it was in his name alone that the ruling was eventually issued.

10. *Brown*, 392 So. 2d at 1330. The reasons for the justices’ behavior have never been divulged. As one commentator pointed out, their motivations may have been to seek justifications for reducing sentences, in the face of a growing public demand for executions. *Cramer*, *supra* note 3, at 26. Benign motives, however, could not forestall cries of “foul!” by prisoners and counsel disturbed by the surreptitious nature of the court’s acts.

11. *Brown*, 392 So. 2d at 1330.

12. 430 U.S. 349 (1977), *cited in Brown*, 392 So. 2d at 1330-31.

13. *Brown*, 392 So. 2d at 1331.

tion was filed with the name of each of the 123 participating inmates attached, the court refused to allow what it saw as a type of class action proceeding.¹⁴ The court pointed out that the petitioners were in different stages of appeal and noted that allowing a joint petition "would distort habeas corpus beyond recognition and create a pernicious precedent in capital cases."¹⁵ Vowing to reject any such future "class actions" summarily, the court nonetheless stated in the next breath that it would "avoid absurd technicalities" by disposing of the claims for relief of all the *Brown* petitioners in its disposition of *Brown's* individual petition.¹⁶

While declining to make any factual findings or admit to receipt of any non-record material in reviewing capital sentences, the court stated that even if the petitioners' most serious charges were true, the court's review of the challenged material was totally irrelevant to its appellate function or to the validity of any individual death sentence.¹⁷

Citing Florida's death penalty statute,¹⁸ the court proceeded to construe its role in capital cases as qualitatively different from the trial judge's role of sentence "imposition."¹⁹ Appellate "review" consisted of two very limited functions: first, to determine whether procedural regularities were observed in the sentencing and secondly, to compare the case under review with all past capital cases to ensure relative proportionality. The statute gives the court no independent fact-finding role. So long as the trial court properly followed procedures and no disproportionality exists, it must affirm the sentence. With the court's function so tightly circumscribed, "it is evident . . . that non-record information we may have seen . . . plays no role in capital sentence 'review'."²⁰ Finally, the court vigorously disclaimed the possibility that

14. *Id.* at 1329-30.

15. *Id.* at 1330.

16. *Id.* at 1330. Similarly, the Eleventh Circuit would use the *Ford* case to make a sweeping disposition of this issue.

17. *Brown*, 392 So. 2d at 1331.

18. FLA. STAT. § 921.141 (1979).

19. *Brown*, 392 So. 2d at 1331.

20. *Id.* at 1332-33. *Cf.* *Shelton v. Tucker*, 364 U.S. 479 (1960) (The Supreme Court's expressed concern, in the first amendment area, that irrelevant information may be utilized in rendering administrative decisions, with no effective means of judicial review).

it would improperly use any non-record information in fulfilling its duties.

A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, [citation omitted] so appellate judges are cognizant of information that they must disregard in performance of their judicial tasks.²¹

The effect of this disclaimer, however, is somewhat diluted by a footnote comment: "The 'tainted' information we are charged with reviewing was, as counsel concedes, in every instance obtained to deal with newly-articulated procedural standards."²² This cryptic statement intimates that the justices did use the psychological profiles in some manner.

B. Implications of *Proffitt v. Florida* and *Gardner v. Florida*

Two leading cases discussed throughout the Florida Supreme Court's opinion and of paramount importance to the eventual resolution of the *Brown* issue were *Proffitt v. Florida*²³ and *Gardner v. Florida*.²⁴ In *Proffitt*, decided in 1976, the United States Supreme Court approved Florida's new death penalty statute, enacted in the wake of *Furman v. Georgia*.²⁵ Since judge, jury and appellate courts were accorded distinct roles, with a minimum of discretion at each level, Florida's scheme did not violate the eighth or fourteenth amendments' prohibition against cruel and unusual punishment. The *Proffitt* plurality emphasized the importance of mandatory appellate review in preventing arbitrary sentencing, noting that "the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency."²⁶ Language in the opinion

21. *Id.* at 1333.

22. *Id.* at 1333 n.17.

23. 428 U.S. 242 (1976).

24. 430 U.S. 349 (1977).

25. 408 U.S. 238 (1972).

26. *Proffitt*, 428 U.S. at 258-59.

suggests that appellate review was seen as an arm of the sentencing process.²⁷ *Gardner*, a case closely following *Proffitt*, invalidated a Florida death sentence in which the trial judge overruled the jury's recommendation for a life sentence, relying in part on a confidential report that had not been disclosed to the defendant or to his counsel.

Confronted with the *Gardner* holding in *Brown*, the Florida Supreme Court dismissed it rather breezily, stating:

Gardner stands for the proposition that a sentence of death may not be imposed (note the word "imposed") to any extent on non-record, unchallengeable information. Since we do not "impose" sentences in capital cases, *Gardner* presents no impediment to the advertent or inadvertent receipt of some non-record information.²⁸

The justices believed *Proffitt* provided support for their distinction between the trial and appellate levels in capital sentencing.

C. Justice Marshall's Dissent

Although the United States Supreme Court declined to grant *Brown*'s petition for certiorari,²⁹ Justice Marshall wrote a dissent that portended many concerns echoed by judges passing on the same issue in *Ford*. Justice Marshall addressed the questionable nature of the Florida court's review practice, which seemed to him a violation of due process. He regarded the practice as inconsistent with his court's past insistence on strict procedural regularity, especially since the material seen by the Florida Supreme Court appeared to be unreliable hearsay.³⁰ *Gardner*, he proposed, "suggested no relevant distinction between

27. Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or life imprisonment. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'

Id. at 253 (citations omitted).

28. *Brown v. Wainwright*, 392 So. 2d 1327, 1332 (Fla. 1981) (citations omitted).

29. 454 U.S. 1000 (1981).

30. *Id.* at 1001 (Marshall, J., dissenting).

the trial court's initial imposition of a sentence and an appellate court's discharge of its mandatory review function."³¹ In Justice Marshall's opinion, the imposition/review distinction drawn by the Florida court was irreconcilable with *Proffitt*. If *ex parte* reports were actually received, the *Proffitt* court's premise that the Florida court would undertake rational and consistent review was, in his view, clearly invalid. If sentences had been upheld or vacated based on non-record grounds, there would be no way for the Florida court to conduct a review for proportionality. Finally, Justice Marshall articulated the bottom-line question which resounds throughout the *Brown* and *Ford* cases, "If the court does not use the disputed non-record information in performing its appellate function, why has it systematically sought the information?"³²

*Ford v. Strickland I*³³

A. The Facts of *Ford*³⁴

The second name listed on the unsuccessful *Brown* petition was that of Alvin Bernard Ford, a death row inmate convicted of murdering a Fort Lauderdale policeman. On the morning of July 2, 1974, Ford and three accomplices, having decided to commit a robbery, went with weapons to a Fort Lauderdale restaurant. During the robbery, several employees escaped from the restaurant. Realizing the police would soon arrive, Ford's accomplices fled while Ford unknowingly remained behind, completing a theft of approximately \$7,000 from the restaurant's vault. As Ford was leaving the building, he was confronted by Officer Dimitri Walter Ilyankoff. Ford fired at the officer, shooting him twice in the abdomen without warning. While Ilyankoff was lying outside the back door of the restaurant, Ford discovered his accomplices had abandoned him. There were no keys in the police cruiser, so Ford returned

31. *Id.*

32. *Id.* at 1002.

33. Because of the procedural posture of the *Ford* case, where the Eleventh Circuit issued two separate decisions, its earlier ruling will be referred to as "Ford I." *Ford v. Strickland*, 676 F.2d 434 (1982).

34. *Ford v. State*, 374 So. 2d 496, 497 (Fla. 1979), *cert. denied*, *Ford v. Florida*, 445 U.S. 972 (1980). *See also Ford v. Strickland*, No. 81-6663, slip. op. at 1-2 (S.D. Fla. Dec. 10, 1981).

to the officer who had, in the meantime, radioed for assistance and was struggling to get up. Ford demanded the keys; Ilyankoff tried to cooperate. Ford then shot the officer in the head at close range, took the keys, and escaped in the police cruiser at high speed. He soon abandoned the cruiser and stole a Volkswagen, which he was driving when arrested for the murder.

Evidence at the trial included the testimony of an employee who saw and heard the shots as she cowered in a utility room at the back of the restaurant, testimony from a nearby resident who also witnessed the incident, the tape of Ilyankoff's call for help, and Ford's fingerprints which were found in the abandoned police cruiser. The jury found Ford guilty of first degree murder and recommended the death penalty. Entering a judgment on the verdict, the trial judge sentenced Ford to death. On direct appeal, the Florida Supreme Court affirmed both the judgment and sentence,³⁵ and the United States Supreme Court denied Ford's petition for certiorari.³⁶ He then joined in the unsuccessful *Brown* petition. Governor Bob Graham signed a death warrant for Ford on November 4, 1981, requiring his execution on December 8, 1981. Represented by a law professor and a staff attorney for the Southern Prisoners Defense Committee, Ford responded with a flurry of legal maneuvers. His post-warrant state appeals were concluded on December 4, when the Florida Supreme Court refused to grant a stay.³⁷ Ford's recourse was to federal district court in Fort Lauderdale, where his hastily-filed petition for a writ of habeas corpus was entertained. The district judge refused to issue an immediate stay, instead conducting a two-day evidentiary hearing on the merits of the *Brown* issue and several other claims made by Ford. Finally, on December 7, 1981, the district court ruled against Ford on all points, denying habeas corpus relief or a stay of execution.³⁸ Prior to this, however, the Eleventh Circuit entered a stay in order to preserve Ford's right to appeal the adverse ruling.³⁹ With his stay being issued only hours before the

35. Ford v. State, 374 So. 2d 496 (Fla. 1979).

36. Ford v. Florida, 445 U.S. 972 (1980).

37. Ford v. State, 407 So. 2d 907 (1981).

38. Ford v. Strickland, No. 81-6663 (S.D. Fla. Dec. 10, 1981).

39. This was an unusual procedure, as courts confronted with a petition for a stay of execution prefer to avoid ruling as long as there is any chance of the stay being granted by a lower court.

scheduled execution, Ford had come closer to the electric chair than any other Florida inmate since John Spenkelink. His habeas appeal to the Eleventh Circuit was the first to present that court with the *Brown* issue. Sensing the need for a rapid, definitive resolution of this recurring claim, the court of appeals made a rare grant of a motion by the State to expedite the appeal.

B. Ford's Legal Argument

In his brief to the Eleventh Circuit, Ford alleged that the Florida Supreme Court's practice infringed numerous constitutional guarantees: the right to due process of law, to the effective assistance of counsel, to confrontation, to be free from cruel and unusual punishment, and to be protected against self-incrimination.⁴⁰ Referring to the *ex parte* nature of the communications in question and the surreptitious manner in which they were received, Ford argued that the Florida Supreme Court's practice posed a greater risk of prejudice and misplaced reliance than the trial court's behavior in *Gardner*.⁴¹ If it is constitutionally impermissible for trial judges to entertain extra-record material in affirming jury recommendations, should not the logic behind this guarantee extend to the appellate phase? Ford attacked the *Brown* court's description of its role in capital appeals as myopic,⁴² marking a complete departure from its earlier self-characterization as part of a trifurcated sentencing process.⁴³ The Florida Supreme Court's recognition of itself as a body sharing equally in responsibility for imposing death sentences had been a major factor in the *Proffitt* court's approval of Florida's death penalty scheme. The court's covert practice, Ford

40. Brief for Petitioner-Appellant *supra* note 3, at 61.

41. Brief for Petitioner-Appellant, *supra* note 3, at 63-64 (citing *Gardner v. Florida*, 430 U.S. 349 (1979)).

42. *Id.* at 66.

43. See, e.g., *Dobbert v. State*, 375 So. 2d 1069, 1071 (Fla. 1979); *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The three components are the jury, which renders an advisory opinion; the trial court judge, who imposes sentence based on certain enumerated aggravating and/or mitigating factors, and the Florida Supreme Court, which conducts a direct mandatory review of all death sentences. Whether the Florida Supreme Court's role was purely one of review or, as Ford argued, was to equally share in the responsibility of imposing a death sentence, represented a crucial distinction for purposes of applying *Gardner*.

argued, violated his right to reliable,⁴⁴ rational⁴⁵ sentencing.

Ford further contended that the secret receipt of non-record information "disrupts the court's role as the guardian of proportionality in capital sentencing."⁴⁶ Disproportionate infliction of the death penalty could be anticipated, since the formal record will be incomplete, portions invisible to appellants and other courts, which may really have shaped the outcome.⁴⁷ Ford refused to credit the Florida court's disclaimed statement as providing an acceptable explanation for its conduct.

Even though Ford's legal arguments were persuasive, his petition suffered from the lack of documentation supporting the allegation that he had been a target of solicitation. This deficiency forced Ford to charge the Florida Supreme Court with the general claim that it had reviewed extra-record reports on a regular basis, and later purged them from its files. The purge, according to Ford, made factual substantiation of an individual's claim very difficult. Ford claimed he was entitled to an opportunity to prove his allegations, possibly gaining relief from his death sentence. He proposed remanding the case to the district court so that discovery proceedings could be undertaken which, although unstated, seemed almost certain to be directed against the Florida Supreme Court justices.⁴⁸ This inability to specifically tie any injury to himself may have been a "fatal flaw" in Ford's petition due to the nature of habeas corpus relief.⁴⁹

44. As required by *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."

45. As guaranteed by *Gardner v. Florida*, 430 U.S. 349, 358 (1977). "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

46. Brief for Petitioner-Appellant, *supra* note 3, at 72.

47. *Id.*

48. The possible course such proceedings might have taken is discussed at note 90, *infra*.

49. The gravamen of habeas corpus relief is that direct harm has occurred to the prisoner as a result of the alleged violation. 28 U.S.C. § 2254 (1976). In rejecting Ford's petition, the federal district judge declared it to be wholly speculative as to him, and labelled Ford's expressed need for discovery a "fishing expedition." *Ford v. Strickland*, No. 81-6663, slip. op. at 8 (S.D. Fla. Dec. 10, 1981).

C. The State's Response

The State's brief emphasized the fact that Ford's claims were, as to him, totally unsubstantiated.⁵⁰ Moreover, the *Brown* issue involved an interpretation of Florida's death penalty scheme. As a matter of state law, the Florida Supreme Court's interpretation should be inviolable. The State defended the Florida court's distinction between the imposition and review phases of capital sentencing. Since Ford's constitutional rights were observed at trial, and the sentencer did not use any undisclosed information, his asserted due process violation was unfounded. The State pointed out that when the Florida Supreme Court acts to change a capital sentence, it can only do so in one way - to reduce a sentence from death to life imprisonment. The court has no authority to review a sentence where life imprisonment was imposed and increase it to death. Even if non-record materials were viewed by the Florida Supreme Court during their review, what harm could be done?⁵¹

Ford's proportionality argument is countered with the retort:

If the unstated premise in the Appellant's argument is that the state appellate court routinely decides cases on bases other than and unrelated to the reasoning stated in the Court's decision, it must fall for the Appellant's bare and unsupported allegations fail to overcome the presumption that judges duly and regularly perform their judicial acts and duties.⁵²

Whether the allegations against the Florida Supreme Court were sufficient to overcome this presumption was to become a pivotal issue in the Eleventh Circuit's analysis. As its final point, the State noted that Ford produced no cases where the sentence of a similarly charged and sentenced defendant was reduced. The State cited numerous cases where capital sentences were affirmed in circumstances similar to Ford's.⁵³

50. Answer Brief of Resondents-Appellees at 51-52, *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982).

51. *Id.* at 56.

52. *Id.* at 58.

53. *Id.* at 60. *See, e.g.*, *Tafero v. State*, 403 So. 2d 355 (Fla. 1981); *Raulerson v. State*, 358 So. 2d 826 (Fla. 1978); *Cooper v. State*, 336 So. 2d 1133 (Fla. 1976); *Holmes v. State*, 374 So. 2d 944 (Fla. 1977).

D. *Ford v. Strickland I*: The Panel Opinion

Following briefs and oral arguments, Ford's case was submitted to a three-judge panel of the Eleventh Circuit Court of Appeals in February, 1982. Any doubt that the Eleventh Circuit intended to use *Ford* to make a blanket ruling on the *Brown* issue was dispelled by the strong language and directives in a stay of execution granted another Florida inmate while *Ford* was under advisement.⁵⁴ In that order, Chief Judge Godbold characterized the *Brown* issue as "a serious and difficult one" and declared that the district judge erred in not entering a stay while the specially expedited *Ford* case was pending.⁵⁵

On April 15, 1981, the panel rendered a two to one decision affirming the district court's denial of relief on all grounds, including the *Brown* claim.⁵⁶ In an opinion authored by Judge Roney and joined by Judge Virgil Pittman,⁵⁷ the panel ruled that the Florida Supreme Court's disclaimer in *Brown* would be accepted as vindicating them of any wrong. Starting at the outset that they rejected the *Brown* contention "both generally and specifically as made for Ford," the panel found the Florida Supreme Court's description of its function to be correct and aptly stated.⁵⁸ The Florida court engaged only in sentence review, not imposition, so their distinction of the *Gardner* case was valid. Ford's alleged due process violations were found to be without merit. Moreover, the majority ruled that "there is not an iota of evidence to indicate the Florida Supreme Court viewed *any* extra-record materials in affirming petitioner's conviction and sentence,"⁵⁹ nor that, had it done so, such review would have been harmful. Labelling Ford's claims bare and unsupported,⁶⁰ they approved the district court's refusal to permit discovery. The majority stressed that principles of comity and federalism demand deference to the Florida court's interpretation of its

54. *Goode v. Wainwright*, 670 F.2d 941 (11th Cir. 1982).

55. *Id.* at 942.

56. *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982).

57. Significantly, a visiting judge from the Southern District of Alabama, sitting by designation.

58. *Ford*, 676 F.2d at 444.

59. *Id.*

60. *Id.*

procedural role⁶¹ and its statement that its members properly perform their functions.

In a biting dissent, Judge Kravitch criticized what she saw as the majority's wholesale adoption of the Florida Supreme Court's reasoning.⁶² She inferred that the Eleventh Circuit was more interested in expediting its docket than ensuring that federal standards are applied to capital sentencing cases. Describing herself as disturbed and unpersuaded by the majority's discussion, Judge Kravitch declared that ambiguities in *Brown* left the question of the Florida court's conduct unresolved.⁶³ If "tainted" information were used by the court, it would undercut the defendant's right to a rational, reliable review as guaranteed by the United States Supreme Court in *Proffitt*. Any attempt to confine the implications of *Gardner* to the trial level is based on an illusory distinction. An appellate court's use of erroneous or misinterpreted material may lead to arbitrary imposition of the death sentence as easily as use by a trial judge.⁶⁴ Judge Kravitch skirted the comity issue, but proposed that Ford be given an opportunity to develop a factual record through discovery or an evidentiary proceeding in the district court.

Thirteen days after this divisive opinion was issued, the court of appeals *sua sponte* ordered that *Ford* be reheard en banc.⁶⁵ Although no reasons were given for this uncommon procedure, perhaps the narrow wording in parts of *Ford*, which did not foreclose the *Brown* claim to petitioners with direct evidence, displeased those members of the court hoping for a more broad-brush ruling. Without a complete disposition, the *Brown* issue would resurface in various forms for years to

61. "As the highest court in the state, the Florida Supreme Court's interpretation of its procedural role is the law of the state and we do not question it." *Id.*

62. *Id.* at 451.

63. *Id.*

64. [T]he risk that an appellate court's reliance on nonrecord information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, will result in the affirmation of a sentence on the basis of erroneous or misinterpreted information presents as great a threat of the arbitrary imposition of death condemned in *Furman* as the risk involved when such a procedure is engaged in by the initial sentencer.

Id. at 454.

65. *Id.* at 456.

come, and the questions involved required a unified, dispositive treatment. The fact that the panel's ruling turned on the vote of a visiting judge,⁶⁶ with the two permanent court members splitting, might have provided an impetus for rehearing. In any event, the number of counsel for both sides multiplied, supplemental briefs were filed, and extended oral arguments were scheduled for June, 1982.⁶⁷

Arguments made in Ford's supplemental brief remained substantially the same. Buoyed by Judge Kravitch's dissent, the defense brief emphasized the ambiguities in *Brown* and hammered away on the possibility of a *Gardner* violation if the court had actually used non-record material.⁶⁸ The fact that the judges systematically solicited the material rather than passively received it belied the suggestion that it was not used, and rebutted the presumption of proper conduct regarded as dispositive by the panel majority.⁶⁹

The State took on a more aggressive tone, relying on a recent United States Supreme Court ruling⁷⁰ which pointedly reminded federal courts not to make unwarranted assumptions about the conduct of state judges. As the Court had said, a federal court may not require a state court to explain the reasons for its actions unless it *first* deter-

66. See *supra* note 57.

67. A distinguished former federal court judge, Marvin E. Frankel, who had argued *Brown* to the Florida Supreme Court, was recalled by the NAACP to assist on the brief and deliver Ford's oral argument. Obviously the defense hoped Frankel would be better received by the federal court than in state court, where his demeanor had been described as patronizing, imperious, and arrogant. Cramer, *supra* note 3, at 24.

68. Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 14-16, *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983).

69. The *Ford* majority determined that the Florida Supreme Court was entitled to the presumption of correctness accorded state court's findings on factual issues under the federal habeas statute, 28 U.S.C. § 2254(d) (1976); cf. *Sumner v. Mata*, 449 U.S. 539 (1981). But can the *Brown* ruling, in which the court's analysis proceeds from a hypothetical ("Even if petitioners' most serious charges were accepted as true . . .") 392 So. 2d at 1331) really be regarded as a proper subject of the presumption?

70. *Harris v. Rivera*, 454 U.S. 339 (1981), in which a trial judge conducting a bench trial rendered what appeared to be inconsistent verdicts. The Second Circuit Court of Appeals accepted the defendant's argument that the judge must have considered inadmissible evidence in arriving at his decision, and ordered that relief be granted unless the judge issued an explanation for his actions. The United States Supreme Court reversed this ruling, holding that a federal court may not require a state court to explain itself unless its actions are first determined to be unconstitutional.

mines that those actions violated the Constitution. The Florida court's act of soliciting and receiving non-record information would not violate the Constitution since it cannot be presumed that the reports were considered in passing on the cases. In fact, the court is entitled to the opposite presumption. Judge Kravitch's dissent, raising the *possibility* of misuse as a rationale for granting relief, showed just the kind of speculation that was disapproved in *Harris*. The only issue presented was not *why* the Florida justices acted as they did, but *whether* they improperly used any non-record information in arriving at decisions. Not only had the Florida Supreme Court disclaimed any consideration of nonrecord material in *Brown*, but its opinions in capital cases thoroughly discuss the facts and law pertinent to its decision. Speculative assumptions cannot overcome the presumption that the Florida justices acted properly, or justify requiring them to testify to their thought processes in federal court.⁷¹

Ford v. Strickland II: The En Banc Ruling

After lengthy and impassioned arguments, the Eleventh Circuit took Ford under advisement in June, 1982. The number of complex issues as well as the divergent attitudes towards their resolution possibly explains why no opinion was issued until January, 1983. In the interim, more stays of execution had been granted based on the pendency of *Ford*.⁷² When finally issued, with a blaze of publicity, the six to five division of the judges and the sheer size of the opinion showed how protracted and diligent the judges' labors were. Their per curiam opinion, which serves as a preface to the five separate opinions, makes reference to the full briefing, extended oral arguments, and months of deliberation which comprised the court's efforts.⁷³

71. Supplemental Brief of Respondents-Appellees on Rehearing En Banc at 12-13, Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

72. See, e.g., Christopher v. Florida, 541 F. Supp. 734 (S.D. Fla. 1983); Palmes v. Wainwright, No. 583 (M.D. Fla. June 11, 1982); Straight v. Wainwright, No. 82-607 (M.D. Fla. June 15, 1982); Johnson v. Wainwright, No. 82-875 (M. D. Fla. May 14, 1982).

73. In a bizarre note, the per curiam opinion reveals that, several months into their deliberations, the judges received a communication from Ford purporting to be a request that all appellate proceedings cease and his sentence be carried out. After nine

A. The Eleventh Circuit's Analysis

The author of the panel's opinion, Judge Roney, on rehearing was joined by four others in his opinion affirming the district court's denial of relief to Ford. Judge Tjoflat, through a separate opinion, became the final member of the plurality to reject the *Brown* issue on its merits.

Judge Roney summarized the issues raised by Ford's *Brown* claim in the following three questions.⁷⁴ If just one were answered affirmatively, the court of appeals would be faced with a possible constitutional violation.⁷⁵ The first question, "Does Florida state law permit the use of such non-record material in the review of Ford's sentence, or any other capital sentence?" was answered in the negative, based on the *Brown* court's statement that factors outside the record were irrelevant and played no part in their sentence review role. Regarding their second question, "Was the material used in contravention of state law?" the plurality replied that they "must be content" to answer no. The highest court of a state must be presumed to follow its own law and procedures. Since Ford was a class petitioner in *Brown*, he is subject to the court's statement that non-record materials were not used in reviewing the petitioners' sentences. Ford did not specifically allege that he had been treated differently from all others. Referring to "current notions of comity and federalism," the court recoiled from the prospect of requiring a state's appellate judges to respond to questions in federal court concerning what was or was not considered by them in review of

years of appeals, it certainly seems incredible that Ford's attitude would so change almost on the eve of a full review of his claims. The court refused to be dissuaded from ruling, however, dismissing his request as "untimely."

Another interesting preface to the court's treatment of the *Brown* issue is the presence on the court of Judge Hatchett, a former Florida Supreme Court justice who had affirmed Ford's conviction on direct appeal shortly before his appointment to the federal bench. Of course, he recused himself from any part of the Ford case. Considering that, at its most fundamental level, the *Brown* issue as raised by Ford really does seek to explore the mental processes of judges, it is interesting to contemplate that the judges had in their midst a man, possessed of candid, firsthand knowledge of the Florida court's actual use of non-record material, who was relegated to the role of mute spectator to the proceedings. Had the relief Ford requested been granted, one of the Eleventh Circuit's own brethren would have been subject to whatever discovery procedures the district court authorized.

74. *Ford v. Strickland*, 696 F.2d 804, 810 (11th Cir. 1983) (en banc).

75. *Id.*

a state case.

Finally, in response to its third question, "Would reading the non-record material so affect the Florida judges that the federal court should, for constitutional review purposes, treat the case as if the information had been used by them?" the court ruled that the Florida Supreme Court's holding in *Brown* supplied a negative answer, thus concluding the matter for purposes of review. Despite his commitment to principles of comity, Judge Roney's uneasiness with the Florida court's ambiguous language and "veiled suggestion(s)" in *Brown* is expressed in his final comments. He wishes the Florida court had given a candid answer to the perplexing question first raised by Justice Marshall in his dissent to the denial of certiorari in *Brown*, i.e., if the court did not use the disputed information, then why had it sought it?⁷⁶

In his separate concurring opinion, Judge Tjoflat agrees that *Brown* effectively disposed of the issue but adds that a crucial distinction has not been adequately made by the majority. Neither *Gardner* nor any other authority, he maintains, forbids an appellate court from merely *reading* non-record material, so long as it does not *rely* on it. Maybe the Florida court's statement did not deny reading non-record material about the petitioners, but it clearly denied relying on any extra-record factors in reviewing their sentences. Since Ford's case was effectively embraced in the *Brown* holding, his claim is especially lacking in merit. Judge Tjoflat rejects Ford's contention that an exception be made to the premise that judges disregard what they must simply because the Florida court solicited rather than passively received the reports.⁷⁷ If such a capability exists, he responds, it does not logically depend on how the information is obtained. Even if such a distinction were conceptually valid, it would be unworkable as a practical matter. Considering how frequently judges see non-record information, countless claims would be made charging that a judge saw information he could not disregard. If such claims turned on the factual issue of whether the judge requested the information or passively received it, the burden on the justice system would be staggering.

In conclusion, Judge Tjoflat remarks that the premise of proper judicial conduct falls when a judge's behavior appears so improper that

76. *Id.* at 811.

77. *Id.* at 833.

it is detrimental to society at large. In such a case, appearance rather than a judge's actual capabilities is at issue. Judge Tjoflat suggests that, had Ford's claim proceeded on this basis, his "swing vote" might have gone the other way.⁷⁸

A troublesome aspect of the case is the majority's failure to meet Ford's argument that use of non-record material undercuts the mandated "proportionality" review. If extra-record material does influence Florida Supreme Court reviews, the real reasons for upholding or commuting a death sentence will be obscured. Thus, the ability of later appellants to receive a meaningful comparative review will be impaired. Given the tenor of the majority's decision, however, further arguments on this issue are unwelcome.

B. The Dissenting Opinions

The three separate dissenting opinions share a number of common themes.⁷⁹ Each expresses dissatisfaction with the Florida Supreme Court's language in *Brown*, and an unwillingness to accept it as dispositive. According to Judge Kravitch, the court neither denied that it systematically requested and received such information, nor acknowledged that the practice is legally objectionable. Moreover, it did not specifically disclaim having used the non-record information it admittedly obtained; it said only that such information is "irrelevant." She maintains the court conceded such use by its footnote statement that "[t]he 'tainted' information we are charged with reviewing was . . . in every instance obtained to deal with newly-articulated procedural standards."⁸⁰ Likewise, Judge Godbold states that he "cannot find in the Florida Supreme Court's opinion what the majority describes as 'the statement that it [extrinsic material] was not used,' and that the disparate views of the judges on this point further demonstrates the opinion's

78. *Id.*

79. Of the five dissenters, three wrote separate opinions. Judge Kravitch wrote a lengthy opinion incorporating many of her earlier criticisms. Chief Judge Godbold issued an opinion joined by Judge Clark. Judge Johnson wrote an independent dissenting opinion and, finally, Judge Anderson, with no separate opinion, joined those of Judges Godbold, Kravitch and Johnson with respect to the *Brown* issue.

80. *Ford*, 696 F.2d at 851-52.

'intractable ambiguity.'"⁸¹ In his opinion, Judge Johnson reads *Brown* to say that the court actually did consider nonrecord material.⁸²

Given this difference of opinion as to the extent of the disclaimer, the dissenters maintain that the majority erred in accepting it without a more thorough analysis. In a strident tone, Judge Kravitch characterizes the majority's analysis as an "attempt to evade the difficult questions presented,"⁸³ and Judge Johnson states that "the majority simply cannot avoid the direct implication of *Gardner*."⁸⁴ The gravamen of the dissents is that *Gardner* does apply to appellate as well as trial courts. Death sentence cases, under *Gardner*, "require a greater degree of reliability than others" and the Florida Supreme Court's solicitation of extra-record materials, in Judge Johnson's opinion, has jeopardized the degree of reliability and rationality required in the administration of the death penalty.⁸⁵ A violation of due process and other constitutional protections is thus present. Judge Kravitch confronts the comity issue by stating that where a state court has ruled that its own procedure is legally sound, independent federal constitutional issues are raised making review by a federal court proper.⁸⁶

While the dissenters agree as to the nature of the constitutional problem, each proposes a different remedy. Judge Godbold maintains that a direct, unequivocal statement by the Florida Supreme Court would satisfy him.⁸⁷ A conditional grant of Ford's petition by the district court is proposed by Judge Johnson, who also seeks a more definite statement from the Florida court: He would have the writ become final "in the event that the Florida Supreme Court does not grant petitioner a new direct review of his conviction and sentence."⁸⁸ Such a review, to satisfy Judge Johnson, would have to be undertaken without the benefit of non-record material or, if such material were used, with prior notice to Ford and his counsel. Under Judge Kravitch's analysis, the ambiguous statements by the court overcome the presumption of regularity.

81. *Id.* at 821.

82. *Id.* at 874.

83. *Id.* at 850.

84. *Id.* at 872.

85. *Id.* at 872-73.

86. *Id.* at 852.

87. *Id.* at 821.

88. *Id.* at 874.

Accordingly, she would place the burden on the State to affirmatively demonstrate that non-record information was not requested, received, or used by the Florida Supreme Court in connection with Ford's case. She would deny relief to Ford only if the State met this burden. If not, she would grant Ford a new appellate review of his sentence⁸⁹ with the conditions proposed by Judge Johnson.

Interestingly, none of the judges, either in the majority or the dissent, confronted directly the issue of the impact that granting relief to Ford would have had on the Florida justice system. Ford asked for remand to the district court so that he could undertake full discovery. While his counsel at oral argument refused to commit himself as to what the scope of such discovery might encompass, the claims made by Ford, if given cognizance, would seem to require nothing less than an exploration of the justices' motivations and actual mental processes.⁹⁰

89. *Id.* at 853. It is noteworthy that this remedy differs from that proposed in her dissent to the April panel opinion, where she argued in favor of a remand for evidentiary procedures. *Ford v. Strickland*, 676 F.2d 434, 455 (11th Cir. 1982). While earlier in her second opinion, Judge Kravitch argues that discovery would not result in embarrassment to the Florida Supreme Court, she is unconvincing and clearly uncomfortable with the sensitive issues a remand would raise.

90. In the words of the opinion:

[I]t is obnoxious both to the traditional role and procedures of the appellate process and to current notions of comity and federalism to suggest that a state appellate judge should be required to respond in a federal court to questions concerning what was or was not considered by him in the review of a state case. Petitioner virtually admits his argument would eventually carry that far if all else failed in obtaining the proof of what he asserts. Any principle that supports the start of that journey would support a conclusion which is not now a part of American law.

Ford, 696 F.2d at 811. (Roney, J., plurality opinion).

While it is speculative to envision what might have followed in the event of a remand, discovery would probably, as a courtesy, have taken the form of depositions or interrogatories rather than examination in open court. The question then posed is whether it would be sufficient to undertake discovery only in Ford's case. Perhaps the procedures would have to be repeated 123 times to vindicate the claims of all similarly situated inmates.

If, instead, the relief granted were a right to a fresh, direct review, how could the court of appeals overcome the argument that the Florida justices were already tainted? Justice Marshall, joined by Justice Brennan, made this point in a recent dissent to a denial of certiorari in another Florida case. A trial judge found to have previously considered inadmissible material re-imposed a death on remand. The justices objected

Had Ford prevailed, the stage would have been set for vacating the death sentences of nearly two-thirds of Florida's death row inmates. The upheaval such an outcome would have caused can easily be imagined.⁹¹ Quite possibly, the *Brown* issue provided a greater threat to Florida's statutory death penalty scheme and its judiciary than any claim raised by death row inmates since *Furman v. Georgia*.⁹²

Conclusion

Unlike the more narrowly-worded panel opinion, the en banc ruling on *Ford* clearly intended to sweep within its scope the similar claims of all Florida inmates, regardless of their ability to document their allegations. As a blanket ruling, it effectively disposes of the *Brown* issue unless certiorari is granted by the Supreme court. In a press interview given January 10, 1983,⁹³ Florida Attorney General Jim Smith stated that, for many death row inmates, the decision ended their avenues of appeal, and predicted that executions would resume in four to six months. Pending disposition of his petition for certiorari, however, the stay of Ford's execution remains in effect.

Whether the Supreme Court will agree to hear *Ford* on certiorari is debatable. It refused to hear *Brown* less than two years ago, and declined to grant a stay of execution in the *Spenkelink* case.⁹⁴ The *Ford* case only affects Florida and thus may not be seen of sufficient national importance to justify the court's review. Sentiment on the current court to stretch comity notions and leave unchallenged the highest

to the same judge reviewing his previously imposed sentence. *Harvard v. Florida*, No. 82-5444, 51 U.S.L.W. 3505 (U.S. Jan. 11, 1983). Fairness standards articulated in *Gardner* require that resentencing be entrusted to a different judge, to avoid the possibility that the judge previously imposing a death sentence may do so again based on a "natural human tendency to rationalize it and suppress doubts." *Id.* at 3507. It is thus likely that if granted, a viable review of Ford's case would have required appointment of special associate justices.

91. As a most dire speculation, the public outcry that would surely accompany a ruling that the Florida justices had caused their death penalty statute to be invalidated, by virtue of their own furtive behavior, might have shamed the responsible members of the court into resigning.

92. 408 U.S. 238 (1971).

93. Fort Lauderdale News, Jan. 11, 1983, at 6A, col. 1.

94. *Spenkelink v. Wainwright*, 442 U.S. 1301 (1979).

state court's interpretations of state law may prevail over the dissenters' suggestion that the Florida Supreme Court's disclaimer should be discounted. Moreover, both sides to the debate realize that the *Brown* issue has been reviewed fully and conscientiously. The fact that the Eleventh Circuit twice entertained the case and twice ruled in favor of the State may discourage the Supreme Court from feeling that it would elicit any new perspective.

As a countervailing consideration, Florida's death row population stands at 201.⁹⁵ Although only one state would be affected by a Supreme Court decision in *Ford*, the number of inmates whose lives are at stake is the nation's largest. Finally, because the *Ford* opinion was so closely divided, the Court may see the lack of consensus as signaling a need for its consideration. Unless certiorari is granted, however, the mystery and unanswered questions which surrounded the Florida Supreme Court's practice seem destined to remain so.

Valerie Shea

95. Miami Herald, Mar. 5, 1983, at 11A, col. 1.

A Common Law for the Age of Statutes. By Guido Calabresi. Cambridge, Massachusetts: Harvard University Press, 1982, Pp. 319. \$25.00

*Reviewed by Ronald Benton Brown**

In common law days, the law evolved gradually on a case by case basis as courts applied the general principles to new and different fact situations. Each adjudication was merely a step in the process by which the judges made the law. The guiding principle was that like cases should be given like treatment. Earlier cases, precedents, were consulted to produce a semblance of consistency as a changing environment caused the law to change and grow.

The twentieth century, particularly since the New Deal, has seen the “‘statutorification’ of American law”¹ as legislatures responded to rapid social and technological changes by an “orgy of statute making”.² Consequently, courts have been forced to learn a new role, that of primarily applying the law given to them rather than creating it. Judges have not always taken this demotion gracefully, especially when the legislation before them is less than perfect. When the statute under consideration is obsolete, the loss of the common law power to change the law is particularly frustrating.

Inertia tends to insulate even an obsolete statute from repeal. Not until a sufficiently powerful group has been offended will there be a change. The legislature may not even realize that a statute is out of date until there is some public uproar about its application. Guido Calabresi, the Sterling Professor at Yale Law School, proposes in *A Common Law for the Age of Statutes* that it is appropriate in the course of adjudicating disputes, for courts to discover which statutes are no longer consistent with the current legal topography. Judges have the training and experience necessary for this task, and the judicial process is particularly likely to reveal any anachronism in the law. Moreover,

* Professor of Law, Nova University Law Center. B.S.M.E. 1970, Northeastern University; J.D. 1973, University of Connecticut; LL.M. 1976 Temple University.

1. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982).

2. G. GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977), *quoted in* G. CALABRESI, *supra* note 1, at 1.

courts are already engaged in this discovery mission.

More importantly, Professor Calabresi points out, courts often refuse to stop at discovery of anachronisms but rather proceed to employ a number of techniques for dealing with obsolete statutes. A court may overreact by finding the statute in question to be constitutionally infirm due only to its obsolescence, or may strain to interpret the statute to eliminate the flaw or to magnify the flaw so as to coerce some legislative reaction. The court might, alternatively, refuse to enforce the statute on the basis of desuetude, vagueness, or invalid delegation. But each of these techniques is a subterfuge for what the court is actually doing and each involves dangers to our political system.

The greatest danger is that all are inherently dishonest. In each technique the court claims to be making its decision on a ground other than the true one—the obsolescence of the statute. The result may be incomprehensible to the electorate. Worse, if the subterfuge is detected, it could deprive the court of its credibility.

If the obsolete law had evolved from cases in the traditional common law fashion, the court could react to the obsolescence by changing the law openly and directly. Faced with an out-of-date statute rather than out-of-date case law, the court encounters a dilemma. The legal literature reveals no doctrine which would justify judicial modification of a statute and, therefore, such judicial action lacks all legitimacy.

Professor Calabresi proposes considering a doctrine which would allow courts to deal with the archaic statute candidly. His proposal would allow the court, after finding the statute no longer fits into the current legal framework, to allocate the burden of the next step according to the appropriate competence of the legislature, judiciary or even an administrative agency. The court would be allowed to alter, nullify, or even enforce the statute subject to a specific statement that a legislative reconsideration resulting in a revision, repeal or reaffirmation is necessary.³ This procedure would have the benefit of providing the

3. Legislative reaffirmation of a statute becomes possible if the court has expressed its opinion that the statute is defective solely because it no longer fits the legal topography. The legislature may respond that it is still supported by a majority and is therefore valid. If the court had used a subterfuge such as unconstitutionality, such a direct and simple response from the legislature would be impossible. What would be required would be either a reworking of the statute to squeeze within constitutional limits or a constitutional amendment.

court with a legitimate course of action. It would also increase the flexibility with which a legislature could subsequently deal with the obsolete statute.⁴

Calabresi denies advocating the adoption of this novel doctrine; he claims to be merely presenting it as a possible alternative to the present situation because it would allow courts to continue substantially on their present course, but without deception. The latter aspect might increase the credibility of the courts, garnering majoritarian support.⁵ However, he implies that it is really the only viable alternative because our system lacks an effective mechanism to stop the courts from nullifying or modifying statutes by subterfuge. The present dishonest approach will end only if courts are offered a more attractive method of eliminating out-of-date statutes.

Unfortunately, Professor Calabresi fails to address another hypothesis which might better explain the present system. The judicial reaction to statutes might not be a result of the fact that judges are better trained and in a better position to discover the outdated statute, but rather that as a result of their education and professional socialization, judges are convinced that the final word on what is the law should lie with them.⁶ Judges, aware that nonlawyers may not share this be-

4. If the court were to determine that a statute is invalid due to vagueness, the legislature in enacting a replacement would have to avoid the "vague" language. Likewise, if the court were to find a statute constitutionally defective, any subsequent statute must avoid a similar defect. If the actual basis for the judgment was that the statute was obsolete rather than vague or unconstitutional, the legislature in reacting must not only produce a modern statute but must also avoid the "vague" language or constitutional defect.

5. This hypothesis is based upon the theory that the electorate would respond affirmatively to a court decision which was based upon an easily understood concept, obsolescence, rather than on esoteric legal doctrine and also would respond affirmatively to court decisions which did not preclude in absolutist terms any response by the electorate through the legislature.

6. The education at Harvard Law School at the time Felix Frankfurter entered in 1902 is described as follows: "Langdell's innovations [the case method] reinforced the conservative legal values that dominated the training of most students, who learned the superiority of judge-made common law over legislation. . . ." M. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 18* (1982). Moreover, one of the most influential of Frankfurter's professors, John Gray, pointed out explicitly that "[A] judge might be swayed by precedent, expert opinion, custom, moral principles, or legislative statutes, 'but in truth all the Law is judge-made law.'" M. PARRISH, *id.* at 20

lief,⁷ avoid a confrontation with the legislature and the electorate by utilizing subterfuge to reclaim the lost common law power. Adoption of the proposed doctrine would simply legitimate the judiciary's return to primacy by its own edict.⁸ Such a bold grasp of power may eliminate

(quoting in part from M. COHEN & E. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY] 407-15 (1951).

The same bias in legal education still exists. *See generally* E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXPLAINED CONCENSUS IN LAW SCHOOL CURRICULA (1975); O. Lewis, Curricula Study (1982) (unpublished manuscript); J. SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL (1978). *See also* Brown, *The U.C.C. (Sales) as an Introductory Law School Course*, 30 J. OF LEGAL EDUC. 592 (1980) arguing that at least one statutory course, such as Sales, should be taught in first year of law school based upon the experience that law students, following a typical first year of common law subjects, strongly resist utilizing even clearly applicable statutes rather than the common law.

7. In 1848 Alexis de Tocqueville criticized American Law because: "Our written laws [the French Civil Law Code] are often hard to understand, but everyone can read them, whereas nothing could be more obscure and out of reach of the common man than a law founded on precedent." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 267 (J.P. Mayer ed. 1969).

It may be hypothesized that one impetus for the "statutorification" of the twentieth century was the electorate's desire for understandable laws. The shift of lawmaking power from the judiciary to the legislature would appear to be a first step in accomplishing that majoritarian desire.

The electorate believes that courts are bound to enforce statutes which are constitutional. Only if there is no statute can judges make their own law. This may be illustrated by an excerpt from a popular college text: "What happens if there is no statutory law governing a case that comes before a court? What if the legislature has not formalized any rule to apply to the dispute? Then the judge must apply the *common law*. Common law is judge-made law." J. BURNS & J. W. PELTASON, GOVERNMENT BY THE PEOPLE 514 (1966) (emphasis added).

The currentness of this belief was recently evidenced in the Senate confirmation hearings of Justice Sandra Day O'Connor. Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711 (1982).

8. de Toqueville pointed out the special status enjoyed by judges and lawyers in the early 19th century: "If you ask me where the American Aristocracy is found, I have no hesitation in answering. . . . It is at the bar or the bench that the American aristocracy is found." DE TOCQUEVILLE, *supra* note 7, at 268.

Few would argue that judges enjoy such elevated status today. *See, e.g.*, Yankelovich, Skelley & White, *Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders in State Courts: A Blueprint for the Future* 5 (proceedings of the Second National Conference on the Judiciary held in Williams-

the very majoritarian support which Professor Calabresi hopes it will garner.

If the power to make, revise and repeal statutes properly belongs to the legislature alone, then the judicial behavior which Professor Calabresi has described is improper and the discussion should focus on the formation of an effective mechanism to curb such behavior in the future. Only if the courts are legitimately exercising revision and repeal powers do we need a doctrine to explain the proper limits of that activity. *A Common Law for the Age of Statutes* makes fascinating reading but shifting the discussion to statutory obsolescence and the effect of inertia in statutory revision seems uncomfortably like a subterfuge to avoid tackling the real issue: whether the ultimate lawmaking power should reside with the courts or with the legislature.⁹

burg, Virginia, (March 19-22, 1978). See also McConnell, *Why People Today Distrust the Courts*, 17 JUDGES' J. 12 (1978).

9. The point is illustrated by the following hypothetical conversation about a hypothetical statute which prohibited removal of another person's gall bladder.

"that law couldn't conceivably pass."

"But suppose it did."

"Come on, it wouldn't. We've got problems enough without hypothesizing absurdities."

"Suppose it did."

"Okay, I'll play your game. If it passed, I think we could get it repealed pretty quick."

"What if we couldn't?"

"Then I'd suppose my elected representatives had found out something about gall bladders that you and I are unaware of."

"Suppose they hadn't. Suppose they were just acting crazy."

"Vote them out. Impeach them. Repeal the law."

"Can't. Most people believe they're doing the right thing."

"And they're just acting crazy too?"

"Right."

"I don't suppose we can reason with them."

"Nope."

"You know what you're telling me? That you don't believe in democracy. . . ."

J. ELY, *DEMOCRACY AND DISTRUST* 182 (1980).

Ely's book, of course, focuses on the scope of judicial review for constitutional violations while Calabresi focuses on the scope of judicial review of obsolete statutes. Both books are, however, reactions to the same ultimate question, what is the appropriate role of courts, *vis a vis* legislatures, in our democratic system. A subsequent ques-

tion would be how the courts can perform their tasks without alienating the popular support necessary for continued successful performance of these tasks.